REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 10, 1982 and APRIL 7, 1983

IN THE

Supreme Court of Nebraska

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DONALD C. PATTON

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By Donald C. Patton, Reporter of the Supreme Court

For the benefit of the State of Nebraska

SUPREME COURT

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[1] Died December 20, 1982

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Number of District	Counties in District	Judges in District	City
First	Johnson, Pawnee, Nemaha, and Richardson	Robert T. Finn	Tecumseh
Second	Sarpy, Cass, and Otoe	Ronald E. Reagan	Papillion
		Raymond J. Case	Plattsmouth
		George H. Stanley	Papillion
Third	Lancaster	Samuel Van Pelt	Lincoln
		William D. Blue	Lincoln
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		James A. Buckley	Omaha
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		John T. Grant	Omaha
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		Jerry M. Gitnick	Omaha
		Paul J. Hickman	Omaha
		Keith Howard	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
Fifth	Hamilton, Polk, York, Butler, Seward, and Saunders	William H. Norton	Osceola
		Bryce Bartu	Seward
Sixth	Burt, Thurston, Dodge, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
Seventh	Fillmore, Saline, Thayer, and Nuckolls	Orville L. Coady	Hebron

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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Tenth	Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster	Bernard Sprague William G. Cambridge	Red Cloud Hastings
Eleventh	Hall and Howard	Joseph D. Martin Richard L. DeBacker	Grand Island Grand Island
Twelfth	Sherman and Buffalo	DeWayne Wolf	Kearney
Thirteenth	McPherson, Logan, Lincoln, Dawson, Keith, Arthur, Grant, Hooker, and Thomas	Hugh Stuart John P. Murphy	North Platte North Platte
Fourteenth	Chase, Hayes, Frontier, Furnas, Red Willow, Hitchcock, Perkins, Gosper, and Dundy	Jack H. Hendrix	McCook
Fifteenth	Brown, Keya Paha, Boyd, Rock, Holt, and Cherry	Henry F. Reimer	O'Neill
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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 81-924: **Bode v. Petet.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellants.

No. 82-002: **Fernald v. Fernald.** Affirmed as modified by order of the court.

No. 82-025: **Rowley v. Caveny.** Affirmed as modified by order of the court.

No. 82-028: **State v. Robinson.** Motion of appellant to enlarge bill of exceptions denied; motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-095: **McManus v. Dewey.** Appeal dismissed; see Rule 7A(4).

No. 82-129: **Scott v. Scott.** Affirmed as modified by order of the court.

No. 82-140: **State v. Townsell.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-207: **State ex rel. Schleve v. Scotts Bluff Co.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-233: **State v. Jewell.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-264: **State v. Shandera.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-280: **State v. Davis.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-281: **State v. Bothwell.** Motion of court-appointed counsel for leave to withdraw appearance

sustained; judgment affirmed; see Rule 3B(4).

No. 82-299: **State v. Green.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-306: **State v. Parks.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 7B(1).

No. 82-308: **State v. Hurley.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-339: **State v. Holzapfel.** Affirmed; see Rule 7A.

No. 82-347: **State v. Clark.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-356: **Duncan v. Duncan.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-366: **State v. Johnson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-367: **State v. Ebberson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-376: **Salisbury v. Salisbury.** Affirmed as modified by order of the court.

No. 82-449: **State v. Ohler.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-450: **State v. Schulz.** Affirmed; see Rule 7A.

No. 82-454: **State v. Coran.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-478: **Ryan v. Howard.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-494: **State v. Martinez.** Affirmed; see Rule 7A.

No. 82-526: **State v. Lujan.** Motion of appellee for summary affirmance sustained; judgment af-

firmed; see Rule 7B(2).

No. 82-533: **First Security Bank & Trust Co. v. Little.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-540: **State v. Erickson.** Dismissed for failure to file briefs.

No. 82-541: **State v. Zweerink.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-560: **Barnard v. Barnard.** Affirmed as modified by order of the court.

Nos. 82-565, 82-566: **State v. Brezina.** Affirmed; see Rule 7A.

No. 82-567: **State v. Rodriguez.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-570: **State v. Allen.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-578: **State v. King.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

Nos. 82-590, 82-591: **State v. Roberson.** Motion of appellee for summary affirmance sustained; judgment of conviction and sentence affirmed; see Rule 7B(2).

No. 82-592: **State v. Fortner.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-613: **State v. Towler.** Dismissed for failure to file briefs.

No. 82-631: **Russell & Perley v. Fitch.** Dismissed for failure to file briefs.

No. 82-638: **Aguayo v. Aguayo.** By order of the court, appeal dismissed at costs of appellant.

No. 82-641: **Yungmeyer v. City of Hastings.** Joint motion for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-650: **State v. Elitte.** Motion of court-appointed counsel for leave to withdraw appearance

sustained; judgment affirmed; see Rule 3B(4).

No. 82-653: **State v. Scott.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-660: **State v. Hamlin.** Affirmed; see Rule 7A.

No. 82-664: **City of Madison v. C & R Engineering.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-669: **State v. Seibert.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-670: **Kahler Construction, Inc. v. Andy's Pizza & Italian Restaurant, Inc.** Dismissed for failure to file briefs.

No. 82-677: **State v. Raven.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-678: **Meyer v. Lutkemeier.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 82-679: **State ex rel. Edler v. Guy.** By order of the court, judgment vacated and cause remanded to the District Court for further proceedings.

No. 82-682: **State v. Michaels.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-684: **Michal v. Dewey.** Appeal dismissed; see Rule 7A(4).

No. 82-686: **Tyler v. Tyler.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-687: **Tyler v. Tyler.** Motion of appellant for dismissal of appeal sustained; appeal dismissed without prejudice.

No. 82-689: **Stromsburg v. Nuttleman.** Appeal dismissed as premature.

No. 82-692: **State v. Vavra.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 82-695: **State v. Stierwalt.** Affirmed; see

Rule 7A.

No. 82-701: **Jones v. Jones.** Affirmed as modified by order of the court.

No. 82-704: **In re Estate of Brown, Sherwood v. Brown.** Dismissed for failure to file briefs.

No. 82-705: **Asche v. Asche.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-706: **State v. Perez.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-708: **Centurion Sales Co., Inc. v. Nebraska Liquor Control Commission.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-714: **State v. Meckna.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-715: **State v. Vanbeek.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-718: **State v. Monroe.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-719: **Tract No. KR-1-3508 v. NPPD.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-722: **J. M. McDonald Co. v. WRC Properties, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-728: **Gleeson v. Frahm.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-735: **State v. Reutcke.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-736: **Harmon v. Harmon.** Affirmed as modified by order of the court.

No. 82-738: **BM&S, Inc. v. Heim-Mick Distributing, Inc.** Motion of appellants for dismissal of ap-

peal sustained; appeal dismissed at costs of appellants.

No. 82-741: **Wellington v. Buttercup Foods.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-753: **Johns v. Beerline.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 7B(1).

No. 82-755: **In re Interest of Friedricksen, State v. Friedricksen.** Motion of appellants for dismissal of appeal sustained; appeal dismissed without prejudice at costs of appellants.

No. 82-756: **State v. Schanaman.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-758: **Christensen v. Piccolo.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

Nos. 82-759, 82-769: **State v. Webber.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-760: **Hohnholt v. American National Insurance Co.** Motion of appellee for summary dismissal sustained; appeal dismissed at costs of appellant; see Rule 7B(1).

No. 82-762: **State of Oklahoma ex rel. Dept. of Human Services v. Sivetts.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-768: **Dowty v. Sunflower Beef Packers, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-770: **State v. Schlabs.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-771: **State v. Burlington Northern Railroad Co.** Motion of appellant for dismissal of appeal sustained; appeal dismissed without prejudice at costs of appellant.

No. 82-775: **Blanco v. The Continental Insurance**

Co. Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 82-782: **Olson v. Olson.** Affirmed as modified by order of the court.

No. 82-786: **State v. Scott.** Dismissed for failure to file briefs.

No. 82-789: **In re Interest of Arthaloney, State v. Taylor.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-790: **In re Interest of Arthaloney, State v. Taylor.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-795: **Parker v. Duxbury.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-796: **Dain Bosworth, Inc. v. Nixon.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 82-799: **Evers v. Bamford, Inc.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-804: **State v. Littleton.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-813: **McGowan v. Driskell.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 82-818: **State v. Styers.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-823: **Phillips v. Johnson.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellant.

No. 82-842: **Kizzier Chevrolet Co., Inc. v. General Motors Corporation.** Affirmed on the court's own motion; see Rule 7A.

No. 82-848: **Hessling v. Western Land Roller.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 83-007: **Bank of Brady v. Rosendahl.** By order of the court, appeal dismissed at costs of appellants.

Nos. 83-008, 83-009: **State v. Hallman.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4); motion of appellant for substitute counsel overruled.

No. 83-010: **State v. Scott.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-017: **Commercial National Bank & Trust Co. v. Jones.** Appeal dismissed at costs of appellant.

No. 83-021: **Searcey v. First National Bank & Trust Co.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 83-027: **State v. Runnals.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 83-029: **State v. Stone.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 83-036: **State v. Kallos.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 83-040: **Tyler v. Tyler.** Motion of appellant for dismissal of appeal sustained; appeal dismissed without prejudice.

No. 83-042: **State v. Smith.** Stipulation for dismissal of appeal allowed; appeal dismissed.

No. 83-049: **Bussart v. Bussart.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 83-065: **In re Estate of Blanchard, Blanchard v. White.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 83-067: **Meyer v. Life Insurance Co. of Georgia.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 83-078: **Tyler v. Plasma Alliance, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 83-081: **IBEW Local 1521 v. MUD.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellant.

No. 83-082: **Tyler v. The Greater Bethlehem Temple.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 83-088: **State v. Kuhn.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 83-092: **State v. Schlund.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed.

No. 83-098: **Eden v. Eden.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellant.

No. 83-160: **State ex rel. NSBA v. Leahy.** Judgment of disbarment entered.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA, APPELLEE, V. ISAIAH JERRY JONES, APPELLANT.

328 N.W.2d 166

Filed December 10, 1982. No. 44117.

1. **Search and Seizure: Probable Cause.** The existence of probable cause must be determined by a practical and not by a technical standard. When objects which are indicative of a criminal offense are within the plain sight of an officer who has the right to be in the position to have such view, a seizure is justified and legal.
2. **Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld in the absence of an abuse of discretion.
3. **Evidence.** The admission into evidence of gruesome photographs rests in the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect.
4. **Homicide: Photographs.** In a homicide case, photographs of the victim, upon proper foundation, may be received for purposes of identification, to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice or intent.
5. _____: _____. A photograph which illustrates or makes clear some controverted issue in a homicide case may be received even if it is gruesome, where a proper foundation has been laid.
6. **Photographs.** In cases where it is appropriate to admit some gruesome photographs into evidence, no more photographs than absolutely necessary should be used.
7. **Criminal Law: Right to Counsel.** The right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel.
8. **Criminal Law: Effectiveness of Counsel.** The standard for determining whether or not counsel for defendant in a criminal prosecution has provided adequate representation requires that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client.

9. **Criminal Law: Immunity.** In order to be constitutionally adequate, the immunity granted by a state to a witness in a criminal case must afford protection to the witness extending to criminal proceedings by other states, or by the United States.
10. _____: _____. Constitutionally adequate statutory immunity must leave the witness and the federal government, or another state government, in substantially the same position as if the witness had claimed his constitutional privilege against self-incrimination, in the absence of a state grant of immunity.
11. _____: _____. The true test of the constitutionality of an immunity statute is whether the result under such a statute is the same as if the witness retained his fifth amendment right and did not testify.
12. **Sentences: Immunity.** Where the defendant has testified in a previous criminal case under a lawful grant of immunity, the sentencing court in a subsequent criminal case cannot consider such testimony or any information directly or indirectly derived from it in determining whether a death sentence should be imposed under the provisions of Neb. Rev. Stat. § 29-2523 (Reissue 1979) and related statutes.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed in part, and in part remanded with directions for resentencing.

John E. North, Jr., and Alan G. Stoler of Fromkin, Herzog, Jabenis & North, for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

MCCOWN, J.

The defendant was charged with first degree murder in the deaths of Ann L. Speese and her 12-year-old daughter, Tina M. Speese. A jury found the defendant guilty of murder in the first degree in the death of Tina Speese, and guilty of second degree murder in the death of Ann Speese. Judgments were entered upon the verdicts, and the trial court sentenced the defendant to life imprisonment for the second degree murder of Ann Speese and to death for the first degree murder of Tina Speese.

On December 4, 1979, the Omaha Police Depart-

ment was called to a residence at 3456 Grant Street. When the police officers arrived they were met by 16-year-old Robert Frazier, who lived at the address with his mother.

Frazier showed the officers a car partially in and partially out of the Frazier garage. The trunk of the car was open and Frazier had already removed some women's clothing, newspapers, and blankets, all of which were blood soaked. The officers observed what appeared to be bloodstains in the trunk well of the car.

Frazier informed the police that Isaiah Jerry Jones had parked the car in the garage earlier that morning and had instructed Frazier to clean out the trunk of the car. Jones was a friend of Frazier's mother and had frequently been at the Frazier residence. Frazier showed the police a handgun given to him by Jones, who had told him that he had been shot in a gun battle as the explanation for the blood in the trunk.

Frazier, who had the keys to the car, also told officers that he had looked in the glove compartment of the car, where he had found a checkbook and a savings and loan book bearing the name of Ann Speese. A police officer testified that he found the checkbook of Ann Speese on the floor of the car. The police officers seized the items which had been removed from the car, and impounded it. The police attempted to locate Jones but were unable to find him in Omaha.

The police also tried to contact Ann Speese, but their investigation indicated that no one had seen her or her daughter since December 2, 1979. At that point an investigation was begun into the disappearance of Ann Speese and her daughter, and the police obtained a search warrant to search Jones' apartment in Omaha.

As part of the search, a forensic serologist conducted a luminol examination of the apartment. A luminol examination involves the application of a

chemical which emits a light blue glow in the presence of bloodstains, which light can be seen in photographs. The luminol examination showed bloodstains on the floor and walls throughout Jones' apartment. Later tests showed the blood which produced the stains was human, matched the blood type of the victims, and did not match the blood type of Jones. Bloodstains matching the victims' blood type were also found on various items of Jones' clothing and other personal items discovered and seized in his apartment.

Further investigation established that on December 3, 1979, Jones had rented carpet cleaning equipment and inquired as to whether it would remove blood from carpeting. On the same day, Jones was observed by several witnesses obtaining a post-hole digger and a shovel from friends. The investigation also established that Jones had been acquainted with Ann and Tina Speese for approximately 2½ years prior to December 1979. Several witnesses, including Jones' sister, testified that they had seen Jones with the Speeses on December 2, 1979, the last day they were seen alive.

On January 14, 1980, the bodies of Ann and Tina Speese were discovered in shallow graves in a wooded area along Interstate 29 near Oregon, Missouri. Exposed leg bones led to the discovery. Both bodies were partially clothed, and the body of Ann Speese was dismembered. The bodies were identified by dental charts and by a key on a chain around the neck of the girl's body, which fit the bicycle of Tina Speese.

A pathologist testified that the death of Ann Speese was probably caused by multiple wounds to the head inflicted by a blunt instrument. The pathologist also testified that Tina Speese died as a result of asphyxiation.

There was also testimony at trial that on December 6, 1979, Jones had requested friends of his to drive him to Kansas City along Interstate 29, and

that when they approached the site where the Speese bodies were later found, Jones scanned the area with binoculars and requested the driver to go past the site a second time.

On March 25, 1980, Jones was arrested in Chicago, Illinois, and returned to Omaha, where he was charged and tried. The witnesses for the defense testified to an alibi defense. The defendant did not testify at trial. The jury found Jones guilty of second degree murder in the death of Ann Speese and first degree murder in the death of Tina Speese. The trial court sentenced him to life imprisonment for the second degree murder and to death for the first degree murder. This appeal followed.

The defendant contends that there was prejudicial error in admitting or refusing to suppress various items of evidence, and in refusing to permit defendant's trial counsel to withdraw and requiring him to proceed rather than to appoint new counsel. Defendant also contends that the Nebraska death penalty statutes are unconstitutional, and that the trial court erred in imposing a sentence of death upon the defendant.

The defendant asserts that the trial court erred in refusing to suppress evidence which had been seized and removed from the defendant's car. Defendant argues that the evidence was derived from a warrantless search of the car by police officers. The evidence does not support the defendant's contention.

When the police arrived at the Frazier residence the articles from the trunk of the defendant's car had already been removed from the trunk by the defendant or Frazier, and Frazier, who had the keys to the car and control of it, showed the articles to the police and explained how they had come to be there. The officers had a legal right to be where they were, and the objects, as well as the interior of the trunk and the car, were in plain view.

The existence of probable cause must be deter-

mined by a practical and not by a technical standard. When objects in an automobile which are indicative of a criminal offense are within the plain sight of an officer who has the right to be in the position to have such view, a search is justified and legal. *State v. Connor,* 189 Neb. 269, 202 N.W.2d 172 (1972); *State v. Collins,* 186 Neb. 50, 180 N.W.2d 687 (1970). At the suppression hearing prior to trial the court properly refused to suppress this evidence, and that determination was correct.

Defendant also contends that it was error to admit testimony concerning the luminol examination of the defendant's apartment, and to admit the photographs which showed the luminol reaction. The argument is that there was not sufficient foundation to qualify the State Patrol forensic serologist or the officer who took the photographs as experts in regard to luminol testing.

The officer who took the photographs essentially testified as a photographer. His job was merely to photograph what he saw, and his testimony established what he had done, and the photographs accurately reflected what he had seen. Such testimony is clearly admissible and did not require foundation evidence showing that he had prior experience with the luminol process.

The forensic serologist testified that luminol examinations are considered and recognized as reliable by the forensic serology profession, and that she had personally conducted luminol experiments and tests and had done fieldwork. The fact that she was a qualified professional serologist is not disputed by the defendant. The argument is that she was not sufficiently experienced in luminol testing to be an expert witness. There is no evidence that luminol testing is not in the field of expertise of a professional serologist.

The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld in the absence of an abuse of discretion.

Shover v. General Motors Corp., 198 Neb. 470, 253 N.W.2d 299 (1977). There was no abuse of discretion in the present case.

The defendant also contends that it was prejudicial error to admit into evidence 24 colored photographs and duplicate slides showing the condition of the bodies of the victims at the time they were brought into the autopsy room, but before the autopsies were begun. The defendant argues that the photographs and slides were gruesome and excessive in number and the prejudicial effect of such photographs upon the jury far outweighed the probative value of the photographs.

The pathologist testified that the photographs helped to illustrate his testimony, and that the slides were preferable to prints so that each photograph would not have to be shown to each juror individually. The pathologist testified, using the slides, that all the photographs showed the condition of the bodies of the victims; that the body of Tina Speese showed bruises indicating that she died as a result of asphyxiation or suffocation; and that the dismembered body of Ann Speese showed bruising around the head and blows to the head with a blunt instrument which probably caused the death, and that the injuries were inflicted while the victim was alive. He also testified that the photographs showed that a saw, or similar mechanical means, was used to dismember the body of Ann Speese.

All the photographs and slides show the condition of the bodies or parts of the bodies of the victims prior to autopsy incisions or any post mortem work. A majority of the photographs show the nature and extent of wounds or injuries and reflect or explain testimony as to the probable causes of death. Six or seven of the photographs and slides were substantially duplicative of other photographs or slides already introduced.

The argument is that the photographs were also unnecessarily prejudicial because the defendant of-

fered to stipulate to the findings of the pathologist contained in the autopsy report. In essence the defendant argues that if the defense stipulates that an autopsy report may be admitted into evidence, without admitting the defendant's responsibility for the acts reflected in the report, the stipulation prevents the State from introducing photographs supportive of the pathologist's testimony. We disagree.

The admission into evidence of gruesome photographs rests in the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. *State v. Freeman,* 201 Neb. 382, 267 N.W.2d 544 (1978). In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice or intent. *State v. Williams,* 205 Neb. 56, 287 N.W.2d 18 (1979).

A majority of the photographs and slides in the present case were admitted into evidence to prove identity, condition of the victims' bodies, the cause of death, and intent and malice. We cannot say that the trial court abused its discretion to the extent that a new trial is required where, as here, more photographs were admitted than were necessary to establish the State's case. A photograph which illustrates or makes clear some controverted issue in a homicide case may be received even if it is gruesome, where a proper foundation has been laid. *State v. Partee,* 199 Neb. 305, 258 N.W.2d 634 (1977).

Under the circumstances shown in the record in the present case, we cannot say, as a matter of law, that the probative value of the photographs was outweighed by their possible prejudicial effect on the defendant or that there was an abuse of discretion on the part of the trial court which requires a new trial.

This court again cautions that the probative value

of gruesome photographs must be carefully weighed by the trial courts, which must determine the relevancy of the photographs and weigh their probative value against their possible prejudicial effect. When other evidence is available prosecuting attorneys should avoid the use of gruesome photographs when the relevance or probative value of such photographs is unclear or doubtful. In cases where it is appropriate to admit some gruesome photographs into evidence, no more photographs than absolutely necessary should be used.

Defendant also contends that the trial court erred in refusing to permit defendant's trial counsel to withdraw, and in refusing to appoint new trial counsel. It should be noted here that defendant's counsel at the time of trial was the second counsel appointed for the defendant, and that defendant's and his counsel's action to replace trial counsel came only 4 days prior to the date trial was scheduled to commence. Counsel on appeal is now the third appointed counsel. The record reflects a breakdown of communication between defendant and his counsel and raises a strong inference that defendant's requests for new counsel were based on mistrust of all lawyers and an attempt to delay the proceedings.

The law in this state is well settled that the right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel. *State v. Fallis,* 205 Neb. 465, 288 N.W.2d 281 (1980). The standard for determining whether or not counsel for defendant in a criminal prosecution has provided adequate representation requires that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client. *State v. Shepard,* 208 Neb. 188, 302 N.W.2d 703 (1981). There is no evidence in the present case that trial

counsel failed to adequately represent the defendant. To the contrary, the record reflects a competent and capable defense.

Finally, the defendant contends that the trial court erred in imposing a sentence of death upon the defendant. More specifically, the defendant argues that at the statutory sentencing hearing in this case the trial court considered immunized testimony of the defendant given at a prior independent criminal trial in the State of Iowa. The argument is that the court based its finding of the aggravating circumstance that the defendant had "a substantial history of serious assaultive or terrorizing criminal activity" and imposition of the death penalty upon that immunized testimony in the Iowa case. Defendant asserts that he was thus deprived of his constitutional privilege against self-incrimination, protected by his grant of immunity. He also contends that the aggravating and mitigating circumstances of the Nebraska death penalty statutes were improperly applied.

In 1978 Charles O. Reese was charged with the first degree murder of Charles Dean Sallis in the State of Iowa. The defendant in the present case was granted immunity under Iowa law in exchange for his testimony against Reese. That immunized testimony was introduced in evidence at the sentencing hearing in the present case to determine whether the death penalty should be imposed.

Neb. Rev. Stat. § 29-2523 (Reissue 1979) defines the aggravating and mitigating circumstances to be considered by the court in determining whether the death penalty should be imposed. Aggravating circumstance (1)(a) is: "The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity."

The court found that no evidence had been submitted that the defendant had previously been con-

victed of either another murder or a crime involving the use or threat of violence to the person, and that the first portion of subsection (1)(a) was not applicable in the present case. The court excluded a Michigan conviction in 1968 for mutilating or defacing a dead body, and a 1964 Indiana conviction for theft.

The court specifically found that the defendant's immunized testimony established that, although the defendant in this case was not the actual killer in the Iowa case, "he was clearly liable, but for the State of Iowa's grant of immunity, as an aider and abettor to first degree murder."

The court then held that the second clause of aggravating circumstance (1)(a) was clearly applicable beyond a reasonable doubt based upon the defendant's previous involvement in the Iowa murder reflected by the immunized testimony. The court specifically held that the defendant's conduct in the Iowa case, set out by his immunized testimony, constituted "a history of assaultive or terrorizing criminal activity which is both 'substantial' and 'serious.' "

Aggravating circumstance subsection (1)(e) is: "At the time the murder was committed, the offender also committed another murder." The court specifically found that aggravating circumstance (1)(e) was clearly applicable.

The court also found that none of the other statutory aggravating circumstances were applicable and that none of the statutory mitigating circumstances were applicable.

The court concluded that the presence of a substantial history of serious assaultive or terrorizing criminal activity, as reflected by the defendant's immunized testimony, and the fact that the defendant also committed another murder at the time the murder of Tina Speese was committed were, together, sufficient to justify imposition of a death sentence.

The court also determined that the nonstatutory

mitigating factors presented by the defendant were not of sufficient weight to approach or exceed the weight given the aggravating circumstances, and that the sentence of death in this case was not excessive or disproportionate to the penalty imposed in similar cases. The sentencing court then imposed a death sentence on the defendant for the murder of Tina Speese.

The Nebraska statute governing immunity in effect at the time was Neb. Rev. Stat. § 29-2011.01 (Reissue 1979). That statute provided in relevant part: "No person who testifies or produces evidence in obedience to the command of the court in such case shall be liable to any forfeiture or penalty for or on account of any transaction, matter or thing concerning or arising from that as to which he may so testify or produce evidence; nor shall such testimony *or evidence be used directly or indirectly in any proceedings against him* except that no person shall be exempt from prosecution and punishment for perjury or contempt committed in so testifying." (Emphasis supplied.)

The current statute in relevant part provides: "The witness may not refuse to comply with such an order of the court on the basis of the privilege against self-incrimination, but no testimony or other information compelled under the court's order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case, except in a prosecution for perjury, giving a false statement, or failing to comply with the order of the court." Neb. Rev. Stat. § 29-2011.02 (Cum. Supp. 1982).

The Iowa statute under which the defendant was granted immunity is more specific. It provides in part: "Testimony, documents or evidence which has been given by a witness granted immunity shall not be used against the witness in any trial or proceeding, or subject the witness to any penalty or

forfeiture . . . ." Iowa Code Ann. § 813.2, Rule 19.3.a.(4) (West 1979).

Under the specific language of the Iowa statute a sentencing hearing to determine whether a death sentence should be imposed is clearly a "proceeding," and it is difficult to imagine any penalty or forfeiture more severe than death. It seems equally clear that a sentencing hearing is an integral part of a "criminal case."

In order to be constitutionally adequate, the immunity granted by a state to a witness in a criminal case must afford protection to the witness extending to criminal proceedings by other states, or by the United States. *Murphy v. Waterfront Comm'n.*, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964).

The aim of the *Murphy* rule is to leave the witness and the federal government, or another state government, in substantially the same position as if the witness had claimed his constitutional privilege against self-incrimination, in the absence of a state grant of immunity. "This purpose can be achieved only if the Federal Government is forbidden not only to introduce the testimony as evidence or to obtain investigatory leads from it, but is also forbidden to see it." *United States v. McDaniel,* 449 F.2d 832, 837 (8th Cir. 1971).

The broad scope of a grant of immunity is also demonstrated by cases holding that testimony compelled under the protection of immunity cannot be used against a witness for impeachment purposes. See, *United States v. Herring,* 602 F.2d 1220 (5th Cir. 1979); *United States v. Moss,* 562 F.2d 155 (2nd Cir. 1977), *cert. denied* 435 U.S. 914, 98 S. Ct. 1467, 55 L. Ed. 2d 505 (1978).

It is clear that immunity statutes are designed to serve as substitutes for the fifth amendment right not to incriminate oneself. Without such statutes no person in a criminal case can constitutionally be compelled to testify.

It is also clear that the only true test of the consti-

tutionality of an immunity statute is whether the result under such a statute is the same as if the witness retained his fifth amendment right and did not testify. The constitutional right would be illusory indeed if testimony produced under a grant of immunity could later be used as evidence of an aggravating circumstance supporting the imposition of a death penalty in a later criminal case against him.

We have found only one case directly dealing with testimony given under a grant of immunity at a previous trial in connection with the sentencing of the immunized witness at a subsequent criminal trial. In *People v. Provost,* 77 Mich. App. 667, 674-75, 259 N.W.2d 183, 186-87 (1977), the Michigan Court of Appeals said: "Defendant's final claim concerns his sentencing. Defendant had previously given testimony under a grant of immunity at a trial conducted before the same trial judge as in the case at bar. That testimony contained statements which would have incriminated defendant in the prior crime were it not for the immunity. Defendant moved to have the judge disqualify himself from sentencing defendant here on the basis of his knowledge of the previous testimony. The judge refused to disqualify himself and stated expressly that he would take the testimony into consideration for this sentence. Given the wide berth of information that a trial court in Michigan can consider in sentencing, we find no error in this court's actions. Under *People v. Grimmett,* 388 Mich 590, 202 NW2d 278 (1972), a sentencing court may consider 'public records concerning the defendant' and 'defendant's admissions to the court'. 388 Mich at 608 [202 N.W.2d at 287]. Since any judge rendering the sentence could have considered the public record of defendant's prior testimony, there was no reason for the trial judge below to disqualify himself or ignore that testimony."

The Supreme Court of Michigan reversed the Court of Appeals and remanded the case to the trial court for resentencing by another judge, and held

that the sentencing judge may not consider defendant's participation in the earlier crime in connection with which defendant received a grant of immunity. *People v. Provost,* 403 Mich. 843, 271 N.W.2d 777 (1978). The basic principle is even more obviously applicable where a death sentence is involved.

We therefore hold that where the defendant has testified in a previous criminal case under a lawful grant of immunity, the sentencing court in a subsequent criminal case cannot consider such testimony or any information directly or indirectly derived from it in determining whether a death sentence should be imposed under the provisions of § 29-2523 and related statutes.

In view of this holding, there was no evidence to support the finding of the sentencing court that aggravating circumstance (1)(a) was applicable in the present case. The death sentence must therefore be vacated and the cause remanded for resentencing.

The conviction and life sentence of the defendant for the murder of Ann L. Speese is affirmed. The conviction of the defendant for the murder of Tina M. Speese is affirmed; the sentence of death is vacated and the cause is remanded to the District Court with directions to hold a new sentencing hearing and sentence the defendant in accordance with the provisions of Neb. Rev. Stat. §§ 29-2520 et seq. (Reissue 1979) and this opinion.

AFFIRMED IN PART, AND IN PART REMANDED WITH DIRECTIONS FOR RESENTENCING.

BEATRICE R. LANGFELD, OWNER, DANIEL LANGFELD, HUSBAND OF BEATRICE R. LANGFELD, APPELLEES, V. STATE OF NEBRASKA DEPARTMENT OF ROADS, APPELLANT.

328 N.W.2d 452

Filed December 10, 1982. No. 44422.

1. **Eminent Domain: Witnesses.** An owner of real property shown to

be familiar with the value of such land is a competent witness to testify as to its value for the use to which it is then being put, without additional foundation. However, in order to estimate its value for other purposes, the owner must, as any other witness, be shown to have an acquaintance with the property and be informed as to the state of the market.

2. **Expert Witnesses.** Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.
3. **Eminent Domain: Evidence.** Evidence of the price at which other lands have been sold is admissible in evidence in condemnation proceedings on the question of damages where such evidence is predicated upon sufficient foundation to furnish a criterion for market or going value of the land condemned.
4. _____: _____. Such lands must be shown to be similar or similarly situated to the land condemned and to have been sold at about the same time as the taking in the condemnation action.
5. _____: _____. Whether the properties the subject of other sales are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court, which will not be interfered with unless abused. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, depend upon the location and character of the properties and the circumstances of the case.
6. **Evidence.** Where the fact sought to be shown, even though independent of the fact being litigated, has an actual and substantial tendency to establish or disprove such fact, it must be admitted. Evidence is relevant not only when it tends to prove or disprove the precise fact in issue but when it tends to establish a fact from which the existence or nonexistence of the fact in issue can directly be inferred.
7. **Expert Witnesses: Witnesses.** The value of an opinion of an expert witness, or any witness, must be dependent upon and is no stronger than the facts upon which it is predicated, and it has no probative force unless the assumptions upon which it was based are shown to be true.
8. **Eminent Domain.** The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances.
9. **Jury Instructions.** If an instruction is not sufficiently specific in some respect, it is the duty of counsel to offer requests to supply an omission.

Appeal from the District Court for Sarpy County:

RONALD E. REAGAN, Judge. Reversed and remanded for a new trial.

Paul L. Douglas, Attorney General, and Warren D. Lichty, Jr., and Sharon M. Lindgren, for appellant.

Charles L. Titus and Robert L. Freeman of White, Lipp, Simon & Powers, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ.

HASTINGS, J.

The appellant, the State of Nebraska Department of Roads, has appealed a judgment in condemnation entered by the District Court for Sarpy County. Assigned as errors include the reception into evidence of value opinion testimony given by the landowner and an expert witness, the exclusion of certain exhibits, improper jury instructions, and excessiveness of the award of attorney fees.

By this action the State of Nebraska Department of Roads acquired the fee title to 5.2 acres of approximately 99 acres of land owned by Beatrice R. Langfeld. The purpose of the acquisition was to reconstruct Highway 50 near its intersection with Interstate 80. In addition to the fee title, certain restrictions as to access from Highway 50 to the plaintiff's remaining property were imposed. The board of appraisers in the county court had awarded damages in the total sum of $131,000. On plaintiff's appeal to the District Court she testified that in her opinion her total damages amounted to $444,603, whereas her expert witness, Joseph G. Strawn, indicated total damages of $438,200. Motions to strike the opinion testimony of both of these witnesses on the ground of lack of foundation were overruled. The State's expert witnesses, Attilio Rindone and George J. Bighia, testified that the total damages were $109,298 and $97,600, respectively. The jury returned a verdict in the amount of $316,595. In addi-

tion, the court awarded the plaintiff the sum of $1,900 as a fee for her expert witness and $45,000 for her attorney fees.

One of the main points of contention between the parties was whether the plaintiff's land at the time of taking was commercial in nature or whether it simply had commercial potential. To a great extent a resolution of this matter depends upon the nature of the access from Highway 50 to the plaintiff's land existing as of the date of the present taking, as well as that which remained following these proceedings.

The plaintiff testified that in placing a value upon her property she considered it as commercial property. In doing so, according to her, she considered the type of access that the property had before the taking. In her words this consisted of two general-purpose driveways and a farm entrance. She said that a general-purpose entrance would accommodate "anything we wanted to bring in" without any limitations having been placed on those accesses by the Department of Roads.

However, the record is quite clear that in a 1962 condemnation proceeding a strip of land formerly part of the plaintiff's farm and lying between the highway right-of-way and the remainder of the property was taken. Those proceedings provided that "there will be no ingress or egress" from the property taken onto the remainder of plaintiff's land except for one private residential entrance "to provide ingress and egress to dwelling of the owner so long as it is used consistent with normal activities thereto" and except for two field entrances "to provide for the movement of farming implements and crops so long as they are used consistent with normal farming operations of the owner." By stipulation later entered into between Mrs. Langfeld and the State of Nebraska, it was agreed that all three entrances or driveways were to be changed to "farmstead entrances to provide ingress and egress to the dwellings and outbuildings sites so long as

they are used consistent with rural living and farming activities."

Additional testimony of the plaintiff, which was claimed to be foundational in support of her opinion as to value, included the fact that she had purchased the property in 1951; that it was used for farming purposes; and that she and her husband moved off the farm in 1974 but the land was still being used for agricultural pursuits, specifically the raising of miniature donkeys. She also said that she was aware of commercial development around the farm, but was not familiar enough with sales of other property in the vicinity as to be able to quote them. As previously mentioned she admitted that in concluding that the property could be developed for commercial interests, she took into account the access which she understood she had and was losing as a part of the instant proceedings. She said that she had never inquired as to whether commercial development would be feasible with the use of the existing driveways, nor did she know from a technical standpoint what would have to be done to provide sewer services, whether gas service was available for certain, or how much it would cost to develop the land. She had never contacted anyone about developing the property. On further questioning she acknowledged that she was a little out of date regarding the access road because she had not lived there for 7½ years. She said that if it were shown that there were restrictions as to access previously existing which would prevent commercial development, she did not know whether that would affect her opinion as to value because that was a very important question which she was not prepared to answer at that time.

Following the conclusion of Mrs. Langfeld's testimony, the State moved to strike all of that testimony relating to value on foundational grounds, which was overruled. It is the court's ruling in denying that motion that constitutes the State's first assignment of error.

As pointed out above, at the time these proceedings were commenced there was a controlled access line preventing ingress and egress from Highway 50 to the plaintiff's land except for the three farmstead driveways. Without further explanation this factor would seem to obviate any reasonable conclusion that the property as it existed at the time these proceedings were commenced was commercial property. The record is also clear that by the terms of these proceedings, although two of the three farmstead driveways were eliminated, they authorized a larger, commercial drive with no restrictions as to the number or size of vehicles entering or leaving the premises.

Considering the plaintiff's apparent misconception as to the situation regarding access, her failure to demonstrate any awareness of the suitability of her property for commercial development, and a lack of knowledge as to the state of the market, we believe that her opinion testimony was utterly devoid of foundation.

However, the plaintiff relies upon what she denominates in her brief as the established rule in Nebraska that a "landowner is always qualified to testify as to the value of her own property in a condemnation action without any further foundation being required." It is true that in a number of our reported cases we can find language strongly supportive of that rule. In *Thacker v. State,* 193 Neb. 817, 824, 229 N.W.2d 197, 202 (1975), we said: "Of course, the owner may always testify as to its value." Earlier, in *Schmailzl v. State,* 176 Neb. 617, 622, 126 N.W.2d 821, 824 (1964), appears similar language: "An owner, by virtue of the ownership relation, is qualified to give his estimate of the value of such property." A case decided the following year which would appear to be directly in point is *Swanson v. State,* 178 Neb. 671, 677, 134 N.W.2d 810, 814 (1965), in which we said: "The owner of real estate which is taken in condemnation proceedings who is familiar

with its value can testify as to its value. State v. Wixson, 175 Neb. 431, 122 N.W.2d 72; 32 C.J.S., Evidence, § 546(116), p. 433. The owner may testify to the value of his property without any foundation being laid other than the fact of his ownership. Borden v. General Ins. Co., 157 Neb. 98, 59 N.W.2d 141. The witness who was also the owner should have been allowed to testify without laying a foundation."

The "ipso facto" rule, as stated above, apparently would permit a person with a limited farm experience, who has no knowledge of the attributes of land necessary for commercial development and no information as to the state of the market as to such type of land, to express an opinion as to value of the land for commercial purposes. Because we believe such conclusion is completely unreasonable, we have chosen to reexamine the logic of the presently existing rule.

The statement in *Thacker, supra,* was pure dictum. *Schmailzl* cited *Johnson v. City of Lincoln,* 174 Neb. 837, 120 N.W.2d 297 (1963), in support of its statement that ownership was the foundation stone warranting an opinion as to value. However, an examination of *Johnson* reveals the following language: "It cannot be questioned that the owner of the real estate which is taken in a condemnation proceeding, or the lessee thereof, who is familiar with its value, and the owner of personal property can testify as to its value. See Chicago, R. I. & P. Ry. Co. v. Buel, 56 Neb. 205, 76 N.W. 571." *Id.* at 848, 120 N.W.2d at 304.

Swanson, supra, cites *State v. Wixson,* 175 Neb. 431, 122 N.W.2d 72 (1963), which in turn relies on *Johnson,* and so on back to *Chicago, R. I. & P. R. Co. v. Buel,* 56 Neb. 205, 76 N.W. 571 (1898). Actually, *Swanson* relied in part upon *Borden v. General Insurance Co.,* 157 Neb. 98, 59 N.W.2d 141 (1953), which was a case involving personal property. Of course, the rule as to personal property is purely one of necessity, as suggested by *Jensen v. Palatine Ins. Co.,*

81 Neb. 523, 116 N.W. 286 (1908), cited in *Borden.* In *Jensen* this court said: "We are of the opinion that where the value of a stock of goods is a relevant fact, *and no more accurate evidence is under the circumstances obtainable,* the owner of such stock and witnesses acquainted with the value of the different articles of which such stock is composed, and who have observed the same for the purpose of estimating the value thereof, may give their opinion of such value." (Emphasis supplied.) *Id.* at 529, 116 N.W. at 289.

However, returning to our common denominator case, *Buel,* its pertinent language is as follows: "It is argued that he [the owner] was not shown to be competent to testify on the question of value. The evidence discloses that he owned the land and *cultivated it, was familiar therewith and with other real estate in the same vicinity, and that he was acquainted with the value of his farm before and after the location of the defendant's right of way.* He was competent to testify on the subject of value, even though he was not an expert, or dealer in real estate. The first paragraph of the syllabus in *Burlington & M. R. R. Co. v. White,* 28 Neb. 166, reads thus: 'Where witnesses are shown to be familiar with the value of a particular piece of land across which a railroad has been built, they are competent to testify as to the value of such tract of land . . . .' And the first and second divisions of the syllabus in *Burlington & M. R. R. Co. v. Schluntz,* 14 Neb. 421 [16 N.W. 439 (1883)] are as follows: '(1.) The owner of land taken for right of way by a railroad company, having resided upon and improved it for several years, who swears that he knows what it is worth, is a competent witness on the question of value. (2.) So, too, are other persons who have resided for several years in the immediate neighborhood of the land, and who seem, upon examination, to be well informed of its situation, condition, and value.' " (Emphasis supplied.) *Id.* at 208-09, 76 N.W. at 572-73.

Decided 2 years before *Buel* is *Chicago, B. & Q. R. Co. v. Shafer,* 49 Neb. 25, 68 N.W. 342 (1896). This court held that if neighbors in the vicinity of the property have been declared competent to testify as to value, then an owner, who has resided upon his own land and is "acquainted from hearsay with the recent sales of land in the vicinity and the prices paid therefor," is also competent to testify. The court's precise holding is contained in the following language: "It appears further from the cross-examination that the plaintiff has resided upon and owned the tract of land in question, which adjoins the city of Seward, for more than twenty years, and knew the cost of the improvements thereon. He is also shown to have been acquainted with the recent sales of land in that vicinity and the prices paid thereat. It has been frequently said by this court that to qualify a witness to give testimony concerning the value of land he must be shown to possess some knowledge of the subject, although the amount or scope of such knowledge has not been defined. Nor is it at this time deemed necessary, if, indeed, it were possible, to lay down a precise rule by which to determine the competency of witnesses as to value in all cases. It is sufficient that resident owners of land in a farming neighborhood have generally been held competent witnesses to the value of real estate in such community. In a leading case upon the subject, *Robertson v. Knapp,* 35 N.Y., 91, the witnesses, all of whom were residents of the immediate neighborhood, some being engaged in farming and others retired farmers, were held competent without further showing. In the opinion it is said: 'There are no certain data which, if given, will fix the value of land. The same data will produce widely different results as to the value, depending, perhaps, on location and the use to which it can be applied, or upon the demand. The value of land in the vicinity is usually understood by all of the residents of a farming neighborhood, without respect to occupation.'

The opinion of such a witness may not be the best or most satisfactory evidence attainable, and yet it is difficult to conceive of persons better qualified to testify upon the subject of the value of *farming* lands than resident owners of like property in the particular locality." (Emphasis supplied.) *Id.* at 31-32, 68 N.W. at 343.

Finally, we refer to *B. & M. R. R. Co. v. Schluntz,* 14 Neb. 421, 16 N.W. 439 (1883), cited as authority in *Buel,* and another similar case decided at the same term of court as *Schluntz, M. P. R. R. Co. v. Coon,* 15 Neb. 232, 18 N.W. 62 (1883). In *Coon,* this court, speaking through Lake, C.J., found that an owner-witness' testimony was erroneously admitted. The court said: "Without any showing whatever, there is certainly no presumption that a witness is competent to give a reliable estimate of the market value of land; and where one's competency is challenged, before he should be permitted to express an opinion, it should be made to appear that he has in some way become qualified to do so." *Id.* at 233, 18 N.W. at 62-63.

Lake, C.J., again speaking for the court, said in *Schluntz:* "The defendant himself was the first witness called. He was subjected to a very lengthy examination upon the question of his competency to testify as to the value of the property. He swore explicitly that he knew its value, and from the fact that he had lived there for twelve years, had made the improvements upon it, and appears to have possessed ordinary intelligence at least, I am satisfied he was qualified to give his opinion on that point." 14 Neb. at 422-23, 16 N.W. at 440.

It seems apparent to us from a review of these early authorities that we have on occasion utilized some broad language. However, the thrust of our competency rule has been to permit the owners of residential or farm properties, who testify that they are familiar with its values, to offer opinions on such value when the land is to be used for the same pur-

pose. We believe that we went too far in *Swanson v. State,* 178 Neb. 671, 134 N.W.2d 810 (1965), when we reversed the action of the District Court and held that a farm owner who testified in detail respecting the adaptability of his land for agricultural purposes only might nevertheless express an opinion as to its value for industrial purposes.

Both Kentucky and Montana have struggled with this same problem. In *Commonwealth, Department of Highways v. Fister,* 373 S.W.2d 720 (Ky. 1963), that court reviewed the history of the "ipso facto" rule and declared that it originated as a matter of practical necessity. It then reasoned that if an owner is presumed qualified to express an opinion simply by reason of ownership, he can immediately testify concerning market values, when in truth and in fact he may lack such knowledge. It then went on to announce a "new rule" as follows: "We see no reason why an owner, before expressing his opinion concerning the market value of his real estate, should not have the initial minimum qualifications required of his neighbors. It follows that the qualifications of the owner witness, as other witnesses, must be affirmatively shown *before* his opinion of market values is expressed." (Emphasis supplied.) *Id.* at 722-23. Such a rule in Nebraska would require the owner to have an acquaintance with the property and to be informed as to the state of the market. *Chudomelka v. Board of Equalization,* 187 Neb. 542, 192 N.W.2d 403 (1971).

Montana has arrived at a somewhat different and, we believe, more reasonable solution. In *Alexander v. State Highway Comm'n,* 142 Mont. 93, 381 P.2d 780 (1963), the Montana court reviewed the earlier cases in much the same way that we have done here. It then concluded: "A resume of the foregoing expressions of this court on the rule permitting an owner to estimate the value of his property discloses that in the early opinions the owner needed the qualifications of practical experience, observation and knowl-

edge on which to base an intelligent opinion." *Id.* at 108, 381 P.2d at 788. It went on to say: "It would appear from the expressions in our later opinions that mere proof of ownership has been interpreted to permit such owner to estimate the value in any field of use of his property that could be conceived, rather than limiting it to his reasonable opinion as to the value of the property. We believe the rule should be further limited to make the owner a competent witness to testify as to the reasonable value of the property for the use to which he is putting it, and to go beyond that field he must possess the qualifications required of a general witness as to value. Illustrating our view, one using land owned by him for the purpose of pasture in grazing cattle may testify in a reasonable way as to its value for that purpose, but he may not testify as to its value as town lots, or as a gravel pit, or for any other purpose unless he be further qualified." *Id.* at 109-10, 381 P.2d at 789.

We therefore restate the rule to be that an owner who is shown to be familiar with the value of his land shall be qualified to estimate the value of such land for the use to which it is then being put, without additional foundation. Such owner is not qualified by virtue of ownership alone to testify as to its value for other purposes unless such owner possesses, as must any other witness as to value, an acquaintance with the property and is informed as to the state of the market. Since the adoption of this rule may make necessary a different procedural method from that heretofore allowed, it shall apply only to trials held after the issuance of the mandate in this case. However, as the judgment before us must be reversed on other grounds, the restated rule here will apply on a retrial of this cause.

The next assignment of error concerns the testimony of Joseph G. Strawn as an expert witness on value. The State contends that it should have been stricken because of his reliance upon "noncom-

parable" sales and that he incorrectly concluded that the land was commercial property.

The first sale he described was a tract of ground containing 48,310 square feet located just across Interstate 80 from the subject property, and which he stated was commercial property. Although he gave no selling price for the specific property, he had indicated that property generally in that commercial subdivision was selling for $1.25 to $1.75 per square foot.

The second sale was located approximately 1 mile north of the plaintiff's property, on Highway 50 and Harrison Street, and consisted of 24,000 square feet, or a little more than one-half of an acre. This sold for $2.49 per square foot.

The third sale involved a tract of ground consisting of 7.9 acres located north of Papillion. It had been purchased by K-Mart Corporation for $56,500 per acre.

According to Mr. Strawn's testimony the first two sales were developed properties, i.e., the utilities and streets were all in place. He said that he was able to compare these properties with the Langfeld property by plugging in some type of an improvement factor. He attempted to explain this factor later on during cross-examination when he stated that it would cost approximately $12,000 per acre to develop raw land for commercial purposes. The third sale, he said, was of undeveloped land. However, no attempt was made to correlate the various factors inherent in that property with those of the Langfeld land.

The State calls our attention to several of our recent opinions dealing with comparable sales. Specifically, in *Clearwater Corp. v. City of Lincoln,* 202 Neb. 796, 804, 277 N.W. 2d 236, 241 (1979), we said: "Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or

conjecture. The witness should not be allowed to express an opinion on an inadequate basis or in respect to facts not disclosed to the jury."

The second time around, in *Clearwater Corp. v. City of Lincoln,* 207 Neb. 750, 301 N.W.2d 328 (1981), we were faced with a claim of error for rejecting evidence of so-called comparable sales. We said: "It is well settled that evidence of the price at which other lands have been sold is admissible in evidence in condemnation proceedings on the question of damages where such evidence is predicated upon sufficient foundation to furnish a criterion for market or going value of land condemned. [Citation omitted.] However, it is equally clear that such land must be similar or similarly situated land sold at about the same time, especially when the price paid depends upon the market or going value rather than other considerations." *Id.* at 753, 301 N.W.2d at 330. We concluded by stating with approval the rule from 5 Nichols on Eminent Domain § 21.31 (1979): " 'Whether the properties are sufficiently similar to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court, which will not be interfered with unless abused. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, is difficult, if not impossible, to prescribe by any arbitrary rule, but must to a large extent depend on the location and the character of the property and the circumstances of the case.' " *Id.* at 754, 301 N.W.2d at 330.

The testimony of the witness as to the details of the three sales was meager at best. But, assuming the correctness of the characterization of the plaintiff's land as commercial property, we cannot say that the trial court abused its discretion in admitting evidence of the three sales.

However, we cannot agree that the record supports a conclusion that this was commercial prop-

erty. In dealing with this issue, we will of necessity have to consider the court's exclusion of certain exhibits, which comprises a separate assignment of error.

Reference has been made earlier to the nature of the access to this property which existed both before and after the commencement of the present proceedings. Although Mr. Strawn stated that "in essence" he was not basing his opinion on unrestricted access to the property, he went on to say: "The access was already at Cornhusker [county road] for this property. There's no limitation on the county road, and there was an access provided, in fact until just a short time ago, to the north edge of this property . . . that was just eliminated . . . . So . . . there was sufficient access for commercial development." Earlier, he had testified that access was limited onto Highway 50 by reason of condemnation proceedings in 1960; however, he went on to say that "there was a stipulation in the County Court records for Langfeld's property, Voss's property, Karloff's, Hanson, from Harrison Street ultimately all the way to the north of Springfield at the Fase property where the State of Nebraska allowed access every quarter of a mile. So depending, of course, on their permit, I assumed the access to be at the north end of the Langfeld property and at Cornhusker . . . ."

Earlier, the plaintiff herself had testified that prior to the present proceedings her access directly to the county road was limited to "two farm entrances, two tractor entrances." Although the witnesses for both parties could have been more specific in their testimony, it appears from the record that the entrance "to the north edge of this property" referred to by Mr. Strawn was the one farm driveway which the State did not eliminate by these proceedings.

Finally, his statement that access was provided for the Langfeld property every quarter of a mile by the stipulation is just not supported by the record.

There is found in exhibit 9 a stipulation between the Department of Roads and Mildred Voss, Wilma Wessel, Raymond Wessel, and John Voss. It provides that if the remainder of the particular property owned by these condemnees is platted and subdivided, streets will be allowed access to the highway at locations to be determined and approved by the State of Nebraska, but which "shall not exceed one street for each quarter mile of State highway frontage." This is the only such stipulation which appears in the record and is applicable only to the land owned by those condemnees—Voss and Wessel. Their property is located in the north half of the northwest quarter of Section 13, Township 14, Range 11. The Langfeld property is all located within the southeast quarter of Section 23, Township 14, Range 11.

Upon further cross-examination the witness Strawn was unable to give a reference as to where the stipulation was located, and, although he testified that he was not saying that the records located in the register of deeds office were incorrect, he did insist that "I just know that there is a stipulation that there will be an access on Highway 50 every quarter of a mile."

In an effort to rebut or impeach this testimony, the State offered in evidence exhibit 11. This exhibit purported to show all documents filed in the office of the register of deeds affecting the subject property during a time commencing prior to the date when the plaintiff first obtained title in 1951 up until the present date. The documents comprising this exhibit revealed the access limitations which had been imposed by the 1962 condemnation proceedings, but, more importantly, they failed to disclose any stipulation as to the additional access, and thereby served to rebut the testimony of Mr. Strawn. The exhibit was also offered for the purpose of contradicting the plaintiff's testimony as to the nature of the access which she enjoyed both before and after these proceedings.

The reason assigned by the trial judge in sustaining the objection to exhibit 11 was that it was cumulative. The exhibit did contain much of the same information that was found in exhibit 9. Exhibit 9 was certified as containing all county court filings with reference to the 1962 condemnation action. On the other hand, exhibit 11, as earlier mentioned, contained all filings made in the office of the register of deeds affecting this property. The appellant was entitled to have all of the evidence before the jury so as to attempt to refute the witness Strawn's testimony that "I just know that there is a stipulation that there will be an access on Highway 50 every quarter of a mile." "Where the fact sought to be shown, even though independent of the fact being litigated, has an actual and substantial tendency to establish or disprove such fact, it must be admitted. Evidence is relevant not only when it tends to prove or disprove the precise fact in issue, but when it tends to establish a fact from which the existence or nonexistence of the fact in issue can be directly inferred." *Rickertsen v. Carskadon,* 169 Neb. 744, 749, 100 N.W.2d 852, 856 (1960). See, also, *Herman v. Midland Ag Service, Inc.,* 200 Neb. 356, 264 N.W.2d 161 (1978); Neb. Rev. Stat. § 27-401 (Reissue 1979).

Exhibit 11 was relevant as to the issue of whether the land in fact had commercial-type access, and it was error not to have received it in evidence. As a matter of fact, absent a further explanation, it, together with the other exhibits, would seem to contradict the assumption of both the plaintiff and her witness that the land was commercial in nature, and their testimony as to value should have been excluded. The value of an opinion of an expert witness, or any witness, must be dependent upon and is no stronger than the facts upon which it is predicated, and it has no probative force unless the assumptions upon which it was based are shown to be true. *Clearwater Corp. v. City of Lincoln,* 202 Neb. 796, 277 N.W.2d 236 (1979).

The State complains that the trial court erred in failing to instruct the jury that it could consider only the loss of *reasonable* access to the remainder property. Instruction No. 5 was the general instruction explaining "reduction in the fair and reasonable market value of the property remaining." The concluding sentence reads: "This may include the reduction in size of the property, or the remaining access and egress to the property when compared to that which existed prior to the taking." This paraphrases NJI 13.05, which concludes with "This may also include . . . the way in which you can get to and from the remaining property as compared to the way in which you could get to and from the property before the taking." *W.E.W. Truck Lines, Inc. v. State,* 178 Neb. 218, 224, 132 N.W.2d 782, 787 (1965), does, as pointed out by the appellant, contain the following language which tends to support its contention: " 'The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances.' " However, although the record does not disclose that the appellant affirmatively approved the instructions tendered by the court, it neither objected to them nor submitted a more specific instruction. If an instruction is not sufficiently specific in some respect, it is the duty of counsel to offer requests to supply an omission. *Beveridge v. State,* 183 Neb. 406, 160 N.W.2d 229 (1968).

Because we order a new trial, it is not necessary for us to consider the claimed error regarding the awarding of attorney fees.

The judgment of the District Court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CLINTON, J., participating on briefs and concurring.

I join in the majority opinion except that I would apply to pending cases the principle of law an-

nounced in the first syllabus. I see no just reason why the principle should not be applied retroactively.

STATE OF NEBRASKA EX REL. MARLIN LANDANGER, APPELLANT, V. MADISON COUNTY BOARD OF COMMISSIONERS, AND PAUL TERRY, HAROLD SEILER, AND LOUIS BARRY, APPELLEES.

327 N.W.2d 93

Filed December 10, 1982. No. 81-594.

1. **Police Officers and Sheriffs.** The office of sheriff and the office of jailer are separate and apart, although the sheriff may, if he elects, act as jailer.
2. _____. If the sheriff performs the duties of jailer in addition to his duties as sheriff, he is entitled not to extra compensation for the performance of his duties as sheriff but to the compensation provided for the performance of the other duties as jailer.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Reversed and remanded with directions.

Walter H. Radcliffe and Ronald Albin, for appellant.

David A. Domina, for appellees.

James H. Moylan of Garvey, Nye, Crawford, Kirchner & Moylan, for amici curiae Adams County et al.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

KRIVOSHA, C.J.

This appeal involves the single question of whether the increase in fees as provided for in the amendment to Neb. Rev. Stat. § 33-117 (Reissue 1978), adopted by the Nebraska Legislature (1980 Neb. Laws, L.B. 628), which increased from $3 to $10 per day the fees to be paid by the county to the sheriff

as jailer when there are prisoners confined in the county jail, may be collected by the appellant, Marlin Landanger, the sheriff of Madison County, Nebraska, during his existing term as sheriff. The sheriff maintains that the increase in fee is due and owing to him as jailer, and not as sheriff. The county board, on the other hand, refuses to pay the increase, maintaining that such fee is compensation and, as such, cannot be increased during the course of the sheriff's term of office, as prescribed by the provisions of Neb. Const. art. III, § 19. The trial court agreed with the county board and found that the increased fee should not be paid. We believe that the trial court was in error in that conclusion, and we reverse the decision of the trial court and remand the action back to the trial court with directions.

Strange as it may seem, this is not the first time this precise question has been presented to this court. It appears that the specific question has been presented to the court on at least three other occasions. See, *Dunkel v. Hall County,* 89 Neb. 585, 131 N.W. 973 (1911); *Afflerbach v. York County,* 95 Neb. 611, 146 N.W. 1050 (1914); *Flint v. Mitchell,* 148 Neb. 244, 26 N.W.2d 816 (1947).

The determination of the question presented in part turns upon the application of article III, § 19. Article III, § 19, in relevant part provides as follows: "[N]or shall the compensation of any public officer, including any officer whose compensation is fixed by the Legislature, be increased or diminished during his term of office . . . ." If, indeed, the position of jailer, for which the increased fees are to be paid to the sheriff as provided for by § 33-117 (Cum. Supp. 1982), is a public office having a fixed term and is included within the provisions of article III, § 19, then the county board's position is correct. On the other hand, if the position of jailer is separate and apart from that as sheriff and, as such, has no fixed term

and is therefore not within the meaning of article III, § 19, the sheriff is correct.

Section 33-117 provides in part as follows: "The several sheriffs shall charge and collect fees as follows: . . . where there are prisoners confined in the county jail, ten dollars shall be allowed *the sheriff as jailer* . . . ." (Emphasis supplied.)

The use of the phrase "sheriff as jailer" is not mere surplusage, for Neb. Rev. Stat. § 47-115 (Reissue 1978) specifically provides for the position of jailer. That section provides: "The jailer or keeper of the jail shall, unless the sheriff elects to act as jailer in person, be a deputy appointed by the sheriff, and such jailer shall take the necessary oath before entering upon the duties of his office; *Provided,* the sheriff shall in all cases be liable for the negligence and misconduct of the jailer, as of other deputies." It is clear from a reading of the statutes that the office of sheriff and the office of jailer are separate and apart, although the sheriff may, if he elects, act as jailer. Furthermore, it is obvious from the clear reading of the quoted section that the office of jailer does not have a term either coextensive with the sheriff or separate and apart. Rather, the jailer is "appointed by the sheriff" and therefore can be removed by the sheriff. The sheriff may elect to serve as jailer during a portion of the time he is sheriff and may appoint a deputy to serve as jailer during the rest of the time. It was for that very reason that in the *Dunkel* case we acknowledged that the Legislature obviously recognized a distinction between the duties of the office of sheriff and those of the position of jailer, and why in *Afflerbach* at 612-13, 146 N.W. at 1050, we specifically held: " 'Section 13, ch. 46, Comp. St. 1907, recognizes a distinction between the duties of the office of sheriff and those of the position of jailer, and gives the sheriff the election to act as jailer in person; and, if the sheriff does not so elect, it provides that the jailer shall be a deputy appointed by the sheriff'—leaving

it optional with the sheriff whether he will discharge the duties of jailer himself or by a deputy. It was held in that case that, if the sheriff 'performs the duties of jailer, in addition to his duties as sheriff, he is entitled, not to extra compensation for the performance of his duties as sheriff, but to the compensation provided for the performance of the other duties as jailer.' "

The county board argues that whatever we may have held prior to the 1920 Constitutional Convention, the convention changed the language of the Constitution and therefore overruled the earlier decisions holding to the contrary. That argument, of course, has no basis for at least two reasons. In the first instance the amendments to the Constitution and, in particular, article III, § 19, did not address the issue of jailer, nor were the predecessors to § 47-115 amended. Furthermore, the *Flint* case, which upheld the right of the sheriff to receive an increase in jailer fees as jailer during his term of office, was decided in 1947, long after the 1920 convention. In *Flint* we specifically said at 245, 26 N.W.2d at 818: "It is also true that if in addition to his duties as sheriff he acts as jailer he is entitled to the fee provided therefor by section 33-117, R.S. 1943." For these reasons, therefore, we hold that the duty of jailer, which may be performed by a sheriff pursuant to § 47-115 and for which he is entitled to receive payment at the rate of $10 per day for each day there are prisoners in jail, pursuant to the provisions of § 33-117, is separate and apart from his duties as sheriff and is not covered by article III, § 19. The jailer does not have a term and, while he may be a public officer, he is not precluded from receiving fees increased by the Legislature. For that reason the Legislature may increase or decrease the fee to be received by the sheriff acting as jailer, or anyone else acting as jailer, whenever it chooses and, when so acting, it becomes effective as provided by the Legislature. The judgment of the Dis-

trict Court is reversed and the cause remanded with directions to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

JACK A. POTTS AND YVONNE L. POTTS, APPELLEES AND CROSS-APPELLANTS, V. THE BOARD OF EQUALIZATION OF HAMILTON COUNTY AND HAMILTON COUNTY, NEBRASKA, APPELLANTS AND CROSS-APPELLEES.

328 N.W.2d 175

Filed December 10, 1982. No. 81-616.

1. **Taxation: Valuation.** All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable value on which the levy shall be made. Neb. Rev. Stat. § 77-201 (Reissue 1981).
2. _____: _____. Under the provisions of Neb. Rev. Stat. §§ 77-202.01 and 77-202.02 (Reissue 1981) any person seeking tax exempt status for any real property shall apply for exemption to the county assessor by January 1 of the year following adoption of §§ 77-202.01 to 77-202.07, on forms prescribed by the Tax Commissioner, and a hearing shall be held by the county board of equalization to consider the matter.
3. **Taxation: Valuation: Presumptions.** There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Once there is competent evidence on appeal to the contrary, the presumption disappears and the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence.
4. _____: _____: _____. Evidence of sale price alone may not be sufficient to overcome the presumption that the board of equalization has valued the property correctly. But where the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller who was not under compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration.
5. **Taxation: Valuation: Appeal and Error.** The trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding.

Appeal from the District Court for Hamilton County: BRYCE BARTU, Judge. Affirmed.

Michael J. Owens, Hamilton County Attorney, for appellants.

Jack A. Potts and Yvonne L. Potts, pro se.

BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and BRODKEY, J., Retired.

BRODKEY, J., Retired.

The appellants, the Board of Equalization of Hamilton County and Hamilton County, Nebraska, appeal to this court from a judgment entered by the District Court of Hamilton County finding that the actual value of certain real estate for taxation purposes in 1980, owned by the appellees herein, Jack A. Potts and Yvonne L. Potts, was $150,000. The only issue involved in this appeal is whether or not the property involved in this case was valued and assessed for tax purposes at more than its actual value. No issues as to uniformity or proportionate equalization are involved.

The property in question is residential property owned by the appellees and purchased by them under a contract dated March 5, 1979, reciting a purchase price of $150,000. Thereafter, on August 6, 1979, the State Board of Equalization and Assessment entered its order that certain changes be made to the valuation of property "by class" in the various counties, as set forth in that order. The schedules attached thereto indicate that Hamilton County was to increase the valuation of its urban real property and commercial and industrial property and improvements thereon by 29 percent, following which the Hamilton County assessor placed the actual value of the Potts residence for the year 1980 at a figure of $166,670. The appellees filed their protest from that assessment with the Hamilton County Board of Equalization; and the board, after a visual inspection of the premises by the assessor and two

members of the county board, fixed the value for taxation purposes at $165,590, or approximately $15,000 greater than the 1979 purchase price for the property paid by Mr. and Mrs. Potts. The appellees thereafter appealed that decision to the District Court of Hamilton County; and after a hearing on the matter the District Court, as stated above, set the actual value of the property at $150,000, without stating its reasons for arriving at that figure, but which coincidently was the same as the purchase price paid by the appellees in 1979. The appeal to this court followed.

The real estate in question is an acreage of approximately 8.9 acres with a residential building and garage, occupied by the appellees, and also a barn located thereon. It is located on the westerly edge of Aurora, Nebraska, on U.S. Highway 34. While the property is classed as residential, it borders the industrial development park which has a number of industrial factories located thereon. There is a buffer zone between Highway 34 and the residence, with a shelterbelt containing several hundred mature trees running the length of the southern property boundary and highway right-of-way.

There is little question that the appellees purchased the property in question from their vendor in 1979 in the normal course of business for real estate transactions in an arm's length transaction, although appellants, by innuendo, suggest that the sale was not an "arm's length transaction" because of the fact that at the time of the sale the vendor was in the process of obtaining a divorce from his wife. However, in oral argument before this court the attorney for the appellants conceded that he had no basis for such inference or conclusion.

The statutes of this state provide: "All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable

value on which the levy shall be made." Neb. Rev. Stat. § 77-201 (Reissue 1981). Also, Neb. Rev. Stat. § 77-112 (Reissue 1981) provides: "Actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; (6) market value in the ordinary course of trade; and (7) existing zoning of the property."

Before proceeding with the discussion of the evidence adduced in this case, we point out that no witnesses who appeared at the trial directly testified as to the "actual value" of the property in question, although documentary evidence was introduced at the trial bearing upon that issue. No independent appraisers testified as to the "actual value" of the property, and the only witness who might possibly be considered as an "expert witness" was the county assessor who testified. Mr. Potts, a certified public accountant, appeared pro se in the proceedings and declined to testify orally until the end of the case, at which point he testified to certain matters not relative to the question of "actual value." His evidence on that point (but not testimony) consisted of six exhibits offered in evidence, which exhibits were not objected to by counsel for appellants, and were received in evidence by the court. It is true, however, that on the offer of exhibit 6 by Mr. Potts, counsel for the appellants did state: "Your Honor, I have no objection to the admission of Exhibit No. 6. I think it's generally hearsay. I don't wish to object on that basis, but I think in view of the situation, Mr. Potts representing himself, that that is an indication of his own testimony, and I don't want to object to it, but I think that I would request that the weight of evidence be weighed in that light." Regardless of

counsel's courteous treatment of Mr. Potts, the fact still remains that all of Mr. Potts' proffered exhibits were received in evidence by the court and are evidence in the case, for whatever weight they are entitled to be given.

We now review the exhibits offered on behalf of Mr. Potts and which were received by the court. Exhibit 1 was the agreement for the sale of the real estate to Jack A. Potts and Yvonne L. Potts for the sum of $150,000, which agreement is dated March 5, 1979. Exhibit 2 is a plat, presumably prepared by Mr. Potts, showing the location of their property with reference to the Aurora Industrial Park and surrounding area. Exhibit 3, prepared by Mr. Potts, is his computation of market value of the property less the exemption permitted by statute with reference to trees along the roadside, under Neb. Rev. Stat. § 77-202 (Cum. Supp. 1982), attached to which is an appraisal of the trees in question by the president of First Securities Corporation in Aurora showing the value of 294 trees at $32,925 which, when deducted from the sale price, according to Mr. Potts, would leave a remaining taxable value in the ordinary course of trade of $117,075. There is no evidence in the record with reference to the foundation for the figures used by the appraiser of the trees. It is true that § 77-202 provides in part: "(2) The increased value of land by reason of shade and ornamental trees planted along the highway shall not be taken into account in the assessment of such land." However, Mr. Potts apparently has overlooked the provisions of Neb. Rev. Stat. §§ 77-202.01 and 77-202.02 (Reissue 1981) which provide that any person seeking tax exempt status for any real property shall apply for exemption to the county assessor by January 1 of the year following adoption of §§ 77-202.01 to 77-202.07, on forms prescribed by the Tax Commissioner, and that a hearing shall be held by the county board of equalization to consider the matter. There is no evidence whatsoever in the

record that the appellees ever requested the exemption for shade trees adjoining the highway previously referred to. Potts' exhibit 4, entitled "Comparison with Other Properties of Known or Recognized Value," constitutes his own interpretation of certain residential property sold 3 months before and 3 months after the acquisition of the property in question, and concludes that the resulting actual value based on comparison with other properties of known or recognized value is $117,000. There is no evidence in the record creating a foundation for this exhibit. Exhibit 5 is Potts' comparison of what he asserts to be comparable property owned by one Gary D. Sallans, by which he purports to show that the assessor's valuation of his property was erroneous and that the resulting value by comparison with that property which he claims to be of the same construction class, relative location, and known value is $124,500. There is no evidence to sustain the conclusion that the two properties are indeed comparable and that there are no differences in construction or other differences which might account for the variation. Potts' exhibit 6, entitled "Reproduction Cost Less Regular Depreciation Desirability and Functional Use," also received without foundation, purports to show that the total valuation based upon reproduction cost less functional and economic obsolescence should have been $125,055.

The foregoing constitutes all the evidence on behalf of Potts. The fact remains that all of such exhibits were received in evidence by the court without objection and constitute evidence on behalf of Potts in the record. There may be some question as to the weight to be given to certain of the exhibits, but there is little question that exhibit 1, the sale price of the property in question on March 5, 1979, was properly received and is to be given great weight in determining the "actual value" of the property in question for tax purposes for the year 1980. In their brief on appeal appellees urge that the court reduce

the valuation for the real estate in question to a sum not greater than $125,055. It is interesting to note, however, that in their petition on appeal to the District Court of Hamilton County, Nebraska, they allege "That attached hereto, marked as Exhibit 'A' and incorporated herein by this reference is a copy of a Purchase Agreement with Houtz G. and Dorothy T. Steenburg for the purchase of the above described real estate in the amount of $150,000, *the actual market value of said real estate.*" (Emphasis supplied.)

We recognize that there is a well-established rule of law in this state that there is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Once there is competent evidence on appeal to the contrary, the presumption disappears and the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence. *Hastings Building Co. v. Board of Equalization,* 212 Neb. 847, 326 N.W.2d 670 (1982); *Otradovsky v. Board of Equalization,* 206 Neb. 559, 294 N.W.2d 334 (1980). In view of what we have stated with reference to appellees' documentary evidence received by the court, we think that under the foregoing rule there can be no presumption that the valuation made by the board of equalization is correct, but that the reasonableness of the valuation in this case is a question of fact to be determined from the evidence.

We now discuss the testimony and evidence adduced by the appellant Hamilton County Board of Equalization. The Hamilton County assessor, Glen Troyer, generally testified that in assessing the appellees' property he had used the Nebraska Construction Cost Manual which he is required by law to use as a guide in assessing real estate. He has the discretion to deviate from the manual if he wishes to do so, but is not obligated to do so. He testified that

in appraising the property in question he had considered the current Construction Cost Manual, depreciation, relative location of the property, comparison with other properties, and market value. Appellees contend, on the basis of the evidence introduced by the assessor, that while normal depreciation was allowed by the assessor in computing the value of the property, no consideration was given to functional or economic obsolescence, which should have been done under the provisions of the Nebraska Construction Cost Manual; and also that the assessor gave no consideration whatsoever to the fact that the residence borders the Aurora Industrial Park, which contains factories, and that this should have been done under the provisions of the manual. They also argue that the county assessor was of the opinion that market value was not a factor in the determination of values. The assessor was aware that the appellees had purchased the property in 1979 for $150,000 but that in his opinion the buyers had received a bargain, and also that he did not consider the one sale as creating market value. He testified that he had arrived at the initial valuation of $166,670 by utilizing the Construction Cost Manual and his judgment on certain factors to establish a base of $129,205, which was then increased by 29 percent as a result of action by the State Board of Equalization. The county assessor's appraisal in the amount of $166,670 was later reduced by the board of equalization to $165,590.

The assessor further testified that after Mr. Potts had filed his protest with the board of equalization, he and others reinspected the property and found out that they had missed a half bath on the original construction and that the barn was overpriced and should have been given a 70 percent depreciation instead of 40 percent, and the figures were thereafter corrected. The assessor was asked: "Q. Do you feel that based upon your inspection and the figures which you used from the manual and also the com-

parison with other similar houses in Aurora and Hamilton County that this figure of $165,590 is *accurate*? A. Yes." (Emphasis supplied.) He did not state, however, that that figure represented the "actual value" of the property for tax purposes. He was also asked: "Q. In other words, location has no bearing on your valuation of real estate in the city of Aurora? A. We feel that—not as far as the building is concerned." He admitted in his testimony that the amount of depreciation and the classification of the real estate in question as to the class as set forth in the manual were judgment matters on his part.

Tom Sherman, one of the Hamilton County commissioners, also testified. He stated that he too had personally inspected the appellees' house and felt that they had received a bargain on their purchase of the premises and that the house in question was one of the best built houses in the county, as was also testified to by the county assessor. Mr. Sherman was asked: "Q. Do you feel that based on your knowledge of the situation that the valuation arrived at by the Board on this protest was a fair and reasonable one? A. Yes, we think it was as fair as we could be. Q. You feel that the fact that—how do you account for the fact that the purchase price is somewhat less than the valuation? A. Well, I agree with Mr. Troyer. He probably got a pretty good buy."

While our statutes require that the assessor consider and use the various elements of "actual value" in the valuation of property for tax purposes, they are merely tools, or guidelines, and the assessor is not bound by them and may deviate from them when, in his opinion, the particular element is not applicable to the case under consideration. We have carefully reviewed the record in this case and have concluded that too much emphasis has been placed upon reproduction costs and other elements, and insufficient consideration was given to relative

location and desirability. Although the District Court did not specifically so state in entering its finding that the actual value of appellees' property was $150,000, it is evident that the court considered that the recent sale price of the property to the appellees for $150,000 was an important consideration in its decision. In short, it felt that the "actual" and "market" value of the property in question was established by that purchase price, market value being one of the seven elements to be considered in determining the "actual" value of property for tax purposes under § 77-112.

Some states have held that the best evidence of true value or actual value is the actual sale of the property in an arm's length transaction. See *Conalco v. Bd. of Rev.,* 50 Ohio St. 2d 129, 363 N.E.2d 722 (1977). Nebraska has apparently not gone that far to the present date, but in *Novak v. Board of Equalization,* 145 Neb. 664, 666, 17 N.W.2d 882, 883 (1945), this court stated: "Plaintiffs rely on the purchase price as constituting the actual value and cite authority from foreign jurisdictions and texts, to the effect that purchase price constitutes the fair market value of property. It is true that the purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing alone, it is not conclusive of the actual value of property for assessment purposes, and many other matters relevant to the actual value of property appear in the record and must be considered in connection with the purchase price to determine the actual value."

Also, in *Collier v. County of Logan,* 169 Neb. 1, 8, 97 N.W.2d 879, 885 (1959), we held: " 'The sale price of property may be taken into consideration in determining the actual value thereof for tax purposes, together with all other elements pertaining to such issue. However, sale price standing alone is not con-

clusive of the actual value of property for tax purposes and other matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value. The true test in all cases is to arrive at actual value, meaning value in the market in the ordinary course of trade.' "

In *Josten-Wilbert Vault Co. v. Board of Equalization,* 179 Neb. 415, 138 N.W.2d 641 (1965), the court held that evidence that a sale of real estate was made at a price less than the value for tax purposes is not ordinarily sufficient to establish that the value of the property has been unlawfully fixed by the county board of equalization, stating at 417, 138 N.W.2d at 643: "We have held that the presumption of correctness disappears if there is competent evidence to the contrary, and thereafter the reasonableness of the valuation is one of fact to be determined by the evidence. [Citation omitted.] Evidence that a sale was made at a price different than the value for tax purposes is not sufficient competent evidence to overcome the presumption without proof of the character and circumstances of sale. There is no magic formula or mathematical yardstick by which actual value can be precisely determined. No single factor or element of value standing alone is conclusive. While a sale price, in some circumstances, may be a very important factor in determining actual value or fair market value, it is only evidence to be considered along with other evidence. 'Sale price' is not synonymous with actual value or fair market value."

However, in his dissenting opinion to the above case, Judge Boslaugh states at 419, 138 N.W.2d at 644: "Evidence of sale price alone may not be sufficient to overcome the presumption that the board of equalization has valued the property correctly. But where, as in this case, the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller

who was not under compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration."

We are of the opinion that the statement of Judge Boslaugh, as set out in his dissenting opinion above and as concurred in by Judge Brower and Judge Smith, is correct and is particularly applicable to the case under consideration.

Our conclusion is that the trial court did not err in setting the value of the appellees' real estate for tax purposes in the amount of $150,000 under the evidence adduced in the record before us. It is the well-established rule, however, that the trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding. *Beaver Lake Assn. v. County Board of Equalization,* 210 Neb. 247, 313 N.W.2d 673 (1981); *Gradoville v. Board of Equalization,* 207 Neb. 615, 301 N.W.2d 62 (1981). This being so, we must consider the evidence anew and make our own decision, both on the appeal of the Board of Equalization of Hamilton County and also on the cross-appeal filed by the appellees who, in their assignments of error in connection with their brief on cross-appeal, contend that the court erred in adopting as actual value the purchase price of $150,000 and in not finding that the actual value, or total value for assessment purposes, was $125,055 or less. From a de novo review of the evidence as contained in the record before us, we hereby find that the actual value of the property in question for tax purposes for the year 1980 is the sum of $150,000, and not the amounts contended for by the respective parties to this appeal and cross-appeal, and the county assessor of Hamilton County is directed to correct his records accordingly.

The judgment of the District Court is affirmed.

AFFIRMED.

Cite as 213 Neb. 49

BUILDING SYSTEMS, INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. MEDICAL CENTER, LTD., A NEBRASKA LIMITED PARTNERSHIP, ET AL., APPELLANTS AND CROSS-APPELLEES.

327 N.W.2d 95

Filed December 10, 1982. No. 81-619.

Pleadings. The refusal to permit an amendment which is proposed at an opportune time, and which should be made in the furtherance of justice, is an abuse of discretion on the part of the trial court. The law of amendments should be liberally construed in order to prevent a failure of justice. Changes in judicial procedure have not altered the rule or indicated any reason for discontinuing its judicial application.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded for further proceedings.

Nelson, Eggers & Morrow, for appellants Medical Center and Action Enterprises.

Bruce H. Brodkey of Garber & Batt, for appellants Trustland and Trustin.

Abrahams, Kaslow & Cassman, for appellee Building Systems.

BOSLAUGH, CLINTON, and HASTINGS, JJ., and CAMBRIDGE, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is a suit to recover on a contract for remodeling a building. Summary judgment was entered for plaintiff, Building Systems, Inc., against defendants Trustland Company, a Nebraska partnership (Trustland), Yale F. Trustin, Medical Center, Ltd., a Nebraska limited partnership (Medical Center), and Action Enterprises, Inc. (Action). Those defendants appeal the judgment, claiming as error the entry of summary judgment, and that the trial court denied their applications to file amended answers and setoff.

The case presents a complicated interrelationship of party and nonparty interests, agreements, claims, and liabilities generally related to the operation of real estate ventures and investments. Originally, William Venard and defendant Trustin each owned one-half of the stock of Building Systems, Inc. Medical Center did business as Ford Professional Plaza, Omaha, Nebraska; it is insolvent. Trustland, a general partnership, was a partner in Medical Center; it is insolvent. Defendants Trustin, Raymond L. Lemke, and Action are general partners of Trustland.

Plaintiff alleges that between July 1976 and November 1977 it remodeled Ford Professional Plaza in performance of a written contract (lost and no available copies) with Medical Center, and there is due $29,492.61 from all defendants because of Medical Center's insolvency. All defendants filed answers on or before July 3, 1980. On March 6, 1981, plaintiff filed a motion for summary judgment. On March 26, 1981, defendants Trustin and Trustland filed their motion for leave to file an amended answer and a setoff, supported by affidavit and proposed amended pleading. On April 1, 1981, defendants Medical Center, Lemke, and Action similarly filed their motion for leave to file an amended answer and setoff.

Upon hearing and rehearing, the motions were denied by the court, stating that the alleged setoff did not arise out of the same transaction between the same parties and would create confusion in the minds of the jury; further, that the possible equitable setoffs would permit defendants through assignment to benefit disproportionately to other creditors.

Hearing on the summary judgment was had forthwith. Plaintiff, Trustland, and Trustin stipulated that Medical Center owed $29,492.61 to plaintiff on the contract for work done on Ford Professional Plaza. Other proof of the amount due was invoices.

Summary judgment was entered for plaintiff against defendants for $29,492.61.

The motion and proposed amendments of Trustin and Trustland exceed 100 pages; in summary, they show that prior to November 8, 1977, Trustin, as sole owner, incorporated Trustland Company, Inc., a corporation (Trustland Corp.). On November 8, 1977, a final settlement agreement was made between plaintiff, Venard, Trustin, and Trustland Corp. dividing and assigning the assets and liabilities of plaintiff. All corporate stock was assigned to Venard. One-half of the accounts receivable was assigned to Trustland Corp., which was to pay one-half of liabilities; Trustin personally guaranteed the payment of the debts. Later, Trustin claims he personally paid $7,138.31 of plaintiff's debts, created a trust to pay certain creditors of plaintiff, and agreed to pay $47,000 of other related debts. The settlement agreement also provided for plaintiff and Trustland Corp. to become parties to a joint venture and assigned certain of plaintiff's assets to the joint venture. These defendants claim the foregoing as an affirmative defense of accord and satisfaction. Plaintiff argues that the setoff must fail for the further reason that Trustland Corp. is not a party defendant.

The motion and proposed amendments of defendants Medical Center, Lemke, and Action restate much of the material in the motion, and claim a right of setoff against plaintiff because the November 8, 1977, settlement agreement and payments made thereunder were made for Action's benefit relating to plaintiff's cause of action. These defendants also allege the creation of a trust for the benefit of some of plaintiff's creditors. Defendant Lemke claims he paid $12,500 into a trust and paid other accounts, all or in part, for the benefit of the plaintiff's creditors arising out of the transaction constituting plaintiff's cause of action.

Defendants devote a large part of their briefs con-

cerning the application of Neb. Rev. Stat. §§ 25-812, 25-813, 25-815, and 25-816 (Reissue 1979) to the proposed setoff, particularly whether it was a part of the same transaction, a setoff, counter claim, or separate cause of action. The resolution of those questions is premature.

" 'A defendant in an action is not restricted to the counterclaim provided for in sections 100 and 101 of the code (now sections 25-812 and 25-813, R.R.S. 1943), but, in a proper case, may seek affirmative relief, either against the plaintiff or against codefendants, by cross-petition.' " *Weller v. Putnam,* 184 Neb. 692, 697, 171 N.W.2d 767, 770 (1969).

Neb. Rev. Stat. § 25-852 (Reissue 1979) provides in part as follows: "The court may, either before or after judgment, *in furtherance of justice*, and on such terms as may be proper, amend any pleading, process or proceeding . . . or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." (Emphasis supplied.)

This statute was discussed in *Kleinknecht v. McNulty,* 169 Neb. 470, 100 N.W.2d 77 (1959), concerning an amendment question similar to the one presented here. The court said that the provision in the statute, "in furtherance of justice," was "the lodestar to guide it." *Id.* at 476, 100 N.W.2d at 81. Further, " ' "[T]he refusal to permit an amendment which is proposed *at an opportune time* and should be made in the furtherance of justice is an abuse of discretion on the part of the trial court." ' " (Emphasis supplied.) *Id.* at 478, 100 N.W.2d at 82. "The law of amendments should be liberally construed in order to prevent a failure of justice. Changes in judicial procedure have not altered the rule, nor indicated any reason for discontinuing its judicial application." (Syllabus of the court.)

Important here is the time that the motions were filed. No issues have been settled, and the hearing

on summary judgment had not been held. The proposed amendments were opportunely presented, fully informing the court of defendants' alleged new and other claims relating to plaintiff's cause of action, and that such was necessary to do complete justice to the parties.

The motions did not present to the court for determination the exact nature of the claims alleged in the setoff, the transactions involved, trial issues and procedures, and possible equities. On the contrary, the issue was whether the setoff alleged claims of the parties that, if proved, should be considered and determined in furtherance of justice. We think that it did.

After the amendments have been filed, it is then that the sufficiency and nature of the amendments can be tested, determined, issues settled, and trial procedures established.

The trial court abused its discretion in denying the motions to amend.

Neb. Rev. Stat. § 25-1330 (Reissue 1979) provides that a party "may, at any time after the filing of answer . . . move . . . for a summary judgment . . . ." Here, defendants had been denied the right to file amended answers and a setoff. To permit plaintiff to proceed in summary judgment would be prejudicial to those defendants. The summary judgment is set aside.

REVERSED AND REMANDED
FOR FURTHER PROCEEDINGS.

IN RE APPLICATION OF CRUSADER COACH LINES, INC. CRUSADER COACH LINES, INC., APPELLANT, V. GREYHOUND LINES, INC., APPELLEE.

327 N.W.2d 98

Filed December 10, 1982. No. 81-654.

1. **Public Service Commission: Appeal and Error.** Upon an appeal

from an order of the Public Service Commission, this court may decide only whether the commission acted within the scope of its authority and whether the order was based on evidence which shows that such order was not unreasonable or arbitrary.

2. **Motor Carriers: Proof.** The burden is on the applicant to show that the proposed service is required by public convenience and necessity. In determining that issue, the controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need; whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers, contrary to the public interest.
3. **Public Service Commission: Appeal and Error.** It is not the province of this court to weigh or resolve conflicts in the evidence or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission, but will sustain the action of the commission if there is evidence in the record to support it.
4. _____: _____. The issue of public convenience and necessity is ordinarily one of fact, and where there is evidence in the record to sustain the Public Service Commission's order, this court cannot say that it is unreasonable and arbitrary. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Public Service Commission.

Appeal from the Nebraska Public Service Commission. Affirmed.

Marshall D. Becker of Stern & Becker, for appellant.

James E. Ryan of Ryan & Williams, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

HASTINGS, J.

This is an appeal from an order of the Nebraska Public Service Commission denying the application of Crusader Coach Lines, Inc., to operate as a common carrier furnishing charter motorbus service between all points within the State of Nebraska.

Protests were filed by Greyhound Lines, Inc., and Arrow Stage Lines, Inc., both of which hold authority to operate charter bus service to all points

within the State of Nebraska, as well as certain regularly scheduled routes within the state. Because of defective service of protest, Arrow was not permitted to offer evidence in support of its protest, but only to make a statement for the record. Greyhound appeared and offered evidence. Following a hearing, the commission found that the applicant was fit, willing, and able to perform the service proposed. Nevertheless, it further found that the proposed service "is not, or will not be required by the present or future public convenience and necessity," and denied the application. Crusader appeals from that order.

Crusader Coach Lines, Inc., is located in Logan, Iowa, and has been in business strictly as a charter bus company since 1979. It holds temporary authority from the Interstate Commerce Commission for operation between all points within and between the States of Iowa and Nebraska which lie within a radius of 150 miles from Logan, Iowa, and all points within the continental United States, as well as certain permanent charter authority in southwest Iowa as granted by the Iowa Department of Transportation. Crusader currently owns and operates four 41-passenger buses. As previously indicated, there is no question as to Crusader's fitness and ability to perform the requested service.

As to the issue of public convenience and necessity, the applicant called two witnesses other than its president, representatives of Brandeis Travel and Triple A World Travel. Both are travel agencies located in Omaha, Nebraska. The witness from Brandeis testified that it was important to her agency that she be able to call a bus company and get confirmation on the price and availability of a bus right away. Her experience with Greyhound, she said, was that it normally took about 3 days to get this confirmation, whereas her experience with Crusader had led her to believe she could get confirmation the same day. She particularly com-

plained that she had tried to book buses for Nebraska football games in Lincoln for the fall of 1981, but was told by Greyhound, Trailways, and Arrow that no buses were available. However, she conceded that buses are extremely difficult to obtain on Nebraska football Saturdays. This witness also testified that Brandeis had used both Greyhound and Trailways for various intrastate package trips and that their services were satisfactory.

The witness from Triple A World Travel gave similar testimony. Her agency had used Greyhound, Trailways, and Arrow, although she said that in a couple of instances she had not been as satisfied with the equipment and the actual busdriver for Arrow as she had been with the other companies. She also complained about the 3- to 5-day wait for confirmation of buses. She said it was important to get back to a potential customer first, as usually these customers are getting bids from other agencies. A lack of buses for football excursions was also cited by her as a problem, although she too agreed that football Saturdays made extraordinary demands on the bus companies for equipment.

The witness in support of the protest of Greyhound testified that its charter revenue amounted to approximately 8 percent of its total revenue generated within the State of Nebraska. He stated that because certain of Greyhound's regular routes and schedules lose money, it is important to have the charter business to make up this loss. Greyhound already experiences competition from Trailways and Arrow for charter business. He said that his company actively solicits charter bus service business in Nebraska intrastate commerce. He stated that in his opinion, with the exception of football Saturdays, Greyhound and the other carriers in the area could adequately handle the intrastate charter business in Nebraska. He volunteered that, on occasion, Greyhound itself has handled 25 or more charters on a football weekend.

The statement offered in behalf of Arrow disclosed that it had been in business in Nebraska for 51 years and that more than 51 percent of its business income comes from charters. Also, according to the statement of Arrow's president, it generally is losing money on the regular routes, which are therefore being subsidized by the charter business. He conceded that four buses probably would not make all that much difference, particularly with relation to the football charters, but he was concerned about the cumulative effect of this application. Arrow has a fleet of 42 buses, 16 based in the Omaha area, and it has as many as 20 to 25 buses available for charter service in the area.

Upon an appeal from an order of the Public Service Commission, this court may decide only whether the commission acted within the scope of its authority and whether the order was based on evidence which shows that such order was not unreasonable or arbitrary. *In re Application of Greyhound Lines, Inc.*, 209 Neb. 430, 308 N.W.2d 336 (1981).

The burden is on the applicant to show that the proposed service is required by public convenience and necessity. In determining that issue, the controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need; whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers, contrary to the public interest. *In re Application of Petroleum Transport Service, Inc.*, 210 Neb. 411, 315 N.W.2d 245 (1982).

The applicant complains particularly of the following language contained in the commission's order: "Charter service has traditionally been the province of the bus lines who provide the regularly scheduled service which is the backbone of passenger and express service. If the Commission were to open up

the charter service to everyone who can buy a bus or two and let those operators skim the cream from the passenger service, it would undermine the already precarious positions of the bus companies who have made significant investments not only in fleets of buses, but in terminal facilities, agencies, and other support functions which a strictly charter operator would not have to make."

The choice of language in a portion of those findings is unfortunate. However, in actuality, it does nothing more than to conclude that by granting the authority it would endanger or impair the operations of existing carriers, contrary to the public interest. The cited case authority justifies such considerations, as does Neb. Rev. Stat. § 75-301 (Reissue 1981): "It is hereby declared to be the policy of the Legislature to (1) regulate transportation by motor carriers in intrastate commerce upon the public highways of Nebraska in such manner as to recognize and preserve the inherent advantages of, and *foster sound economic conditions in, such transportation and among such carriers, in the public interest* . . . ." (Emphasis supplied.)

The applicant who was denied authority in the case of *In re Application of Schroetlin,* 210 Neb. 508, 315 N.W.2d 630 (1982), also complained that the commission accepted evidence of possible economic harm to other carriers as being sufficient ground upon which to deny a certificate without any evidence of harm to the public interest. However, we answered that charge with the following language: "Whether we agree or disagree with the decision of the commission, however, is immaterial. It is not the province of this court to weigh or resolve conflicts in the evidence, or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission but will sustain the action of the commission if there is evidence in the record to support it.

"The issue of public convenience and necessity is

ordinarily one of fact and where there is evidence in the record to sustain the Public Service Commission's order, this court cannot say that it is unreasonable and arbitrary. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Public Service Commission." *Id.* at 512, 315 N.W.2d at 633.

The findings of the commission are supported by the record, and its order denying the application must be affirmed.

AFFIRMED.

DORSEL J. CARMICHAEL, APPELLANT, V. ROBERT R. CARMICHAEL, APPELLEE.

326 N.W.2d 854

Filed December 10, 1982. No. 81-664.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

L. J. Karel, for appellant.

Peter L. Harlan of Schrempp & Lefler, for appellee.

KRIVOSHA, C.J., HASTINGS, and CAPORALE, JJ., and RIST, D.J., and COLWELL, D.J., Retired.

RIST, D.J.

This is an appeal from a decree of dissolution of marriage.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

NORMANDY SQUARE ASSOCIATION, INC., ET AL., APPELLEES, V. ELMA M. ELLS, APPELLANT.

327 N.W.2d 101

Filed December 10, 1982. No. 81-666.

Restrictive Covenants. Where powers are granted to a committee to approve or disapprove the erection of a fence based on a standard of whether it conforms to the harmony of external design and location in relation to surrounding structures, such a standard, per se, is not ambiguous and, in proper circumstances, it is enforceable, provided that the authority is exercised reasonably within the framework of the covenant purposes. Such rule is to be applied on a case-by-case basis.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Terry K. Barber of Johnston, Barber & Wherry, for appellant.

Barlow, Johnson, DeMars & Flodman, for appellees.

KRIVOSHA, C.J., HASTINGS, and CAPORALE, JJ., and RIST, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Defendant, Elma M. Ells, appeals from a mandatory injunction requiring relocation of a fence she built contrary to restrictive covenants and the approval of plaintiff Normandy Square Association, Inc. (Association).

The Association includes all owners of housing units in the Normandy Square addition to Lincoln, Nebraska. Pursuant to restrictive covenants, defendant made application to build a new fence on her property, Lot 11, Block 4. Upon review by the Association's architectural committee (committee), changes were required and conditional consent was given. Defendant disregarded the restrictions and constructed the fence as she had proposed. This suit followed. Upon trial, plaintiff Hassan Sharifi was the only witness; defendant offered no evidence.

After a personal inspection, the trial judge found for the plaintiffs, ordering the specific location of the fence, including a 25-foot setback from the street and enclosure of the utility box. Defendant appeals, assigning as error, considered together, (1) the covenants were vague and ambiguous, and (2) they were arbitrarily applied.

The only issue here is whether article VII of the corporate "Declaration of Covenants, Conditions and Restrictions" is enforceable. It reads in part as follows:

"Architectural Control

"No building, fence, wall or other structure shall be commenced, erected or maintained upon the property, nor shall any exterior additions to or change or alteration therein be made until the plans and specifications showing the nature, kind, shape, height, materials and location of the same shall be submitted to and approved in writing as to the harmony of external design and location in relation to the surrounding structures and topography by the directors of the Association, or by an architectural committee composed of three or more representatives appointed by the board."

Defendant's application was to build a 6-foot stockade-type fence beginning about 5 feet from her south front lot line, running thence west 7 feet, thence north along the west side of her residence 111 feet, thence east 35 feet, thence south 6 feet, and east 5 feet (to exclude a metal utility box), and thence south 23 feet to the midpart of the dwelling.

Within a few days the committee considered the application, and on December 8, 1980, approved the application with changes, material here, that the fence must commence 25 feet north from the south lot line; on the north, it must run straight east on the lot line, so that the utility box was south of the fencing; and "Should you desire during the winter to put up a temporary removable snow fence on the front twenty-five feet on the west, we see no objection to

that." The approval was personally delivered to defendant by Sharifi, the Association's secretary. It appears defendant understood the approval, but said "she wanted the fence and it was her property"; also, she had indicated that one purpose for the fence at the front was for protection from drifting snow.

Defendant contends *Ross v. Newman,* 206 Neb. 42, 291 N.W.2d 228 (1980), is dispositive here. We do not agree. *Ross* turns on the lack of a standard for "alteration." Here, the structure in question is a fence, which requires no further description or standard. Defendant understood the restriction, as shown by her application.

The record does present the question of whether or not the powers of the committee are ambiguous and enforceable. These issues are fully discussed in the annotation "Validity and Construction of Restrictive Covenant Requiring Consent to Construction on Lot," 40 A.L.R.3d 864 (1971). "It has been said that today housing is ordinarily developed by subdividers who utilize the restrictive covenant to guarantee to the homeowner that his house will be protected against adjacent construction which will impair its value, and that a general plan of development will be followed; the requirement of consent to construction or approval of plans of construction is one method by which guaranties of value and of adherence to a general plan can be accomplished and maintained.

"The cases collected herein . . . all seem to agree, at least as a generalized proposition, on the validity and, in a proper case, the enforceability, of covenants requiring consent to construction or approval of plans of construction, which covenants do not of themselves impose standards of approval . . . when applicable to all of the lots in a residential subdivision as part of a uniform plan of development . . . . *Also generally recognized is the validity and, in a proper case, the enforceability, of restrictive cove-*

nants requiring approval of plans of construction, which covenants in themselves regulate the extent of the authority to approve, as by imposing standards upon which disapproval might be based." (Emphasis supplied.) *Id.* at 870.

Article VII of the declaration imposes the following broad standard for the committee's approval: "[T]he harmony of external design and location in relation to the surrounding structures and topography . . . ." Such standard in a proper case is generally held not ambiguous, and enforcement follows where the authority is exercised reasonably. See, *Hollingsworth, et al., vs. Szczesiak, et al.,* 32 Del. Ch. 274, 84 A.2d 816 (1951); *Winslette v. Keeler,* 220 Ga. 100, 137 S.E.2d 288 (1964); Annot., 40 A.L.R.3d, *supra* at 876.

Other covenants included in the declaration and bylaws impose duties on the committee and owners to maintain the exterior attractive appearance and condition of the homes, common areas, streets, sidewalks, driveways, and parking areas, including control of the construction of foundations, the color of roofs and vents, and television antennas. A part of the declaration recites that such are for the "purpose of enhancing and protecting the value, desirability and attractiveness of said property . . . ."

It appears that article VII was a part of a general intended plan for the development, maintenance, and improvement of the subdivision for the benefit of all owners. *Hogue v. Dreeszen,* 161 Neb. 268, 73 N.W.2d 159 (1955).

As shown in the A.L.R. annotation, the authorities are in disagreement as to any rule of law that can be applied in these cases because of the unlimited purposes, plans, local regulations, and circumstances that may possibly exist. We think the applicable rule here is that where powers are granted to a committee to approve or disapprove the erection of a fence based on a standard of whether it conforms to the harmony of external design and location in re-

lation to surrounding structures, such a standard, per se, is not ambiguous and, in proper circumstances, it is enforceable, provided that the authority is exercised reasonably within the framework of the covenant purposes. Such rule is to be applied on a case-by-case basis.

We conclude that although the standards are general and broad, they do conform to the purposes of the declaration for the benefit of all owners, they were neither ambiguous nor vague, and they were not contrary to public policy. Under the circumstances here, the committee had the power to act. Did it do so reasonably?

The record shows that the fence extended to a point within 4 to 5 feet from the sidewalk; it prevented some visibility by other owners; it was described variously as an eyesore, ugly, prominent, and imposing; and that the 6-foot by 5-foot area at the rear of the house which excluded the utility box was an eyesore resembling a garbage unit, causing a mowing problem and a neighborhood character change. Plaintiffs' conditional approval was reasonable and enforceable under the facts and circumstances of this case.

AFFIRMED.

ANN H. KUHLMAN, APPELLEE, V. GWYER GRIMMINGER ET AL., APPELLANTS.

327 N.W.2d 104

Filed December 10, 1982. No. 81-751.

Contracts: Specific Performance: Abatement. Where it appears that the vendor is unable to make a complete or perfect title, or that there is a deficiency in the quantity of land contracted to be sold, the general rule is that the vendee, if he so elects, is entitled to have the contract specifically performed to the extent of the vendor's ability to comply therewith and at the same time have a just abatement out of the purchase price for the deficiency of title, quantity, or quality of the estate to compensate for the vendor's

failure to perform the contract in full. The measure of abatement should be such portion of the purchase price as the relative value of the land lost bears to the purchase price of the whole tract.

Appeal from the District Court for Merrick County: JOHN M. BROWER, Judge. Affirmed.

O. Wm. VonSeggern of Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellants.

Powell & Powell, for appellee.

BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and BRODKEY, J., Retired.

PER CURIAM.

This suit began as a foreclosure of a real estate mortgage brought by plaintiff, Ann H. Kuhlman. Defendants, Gwyer Grimminger and Carol Grimminger, husband and wife, by cross-petition allege abatement of the amount due because plaintiff was unable to convey a part of the land; defendants do not resist the sale. Foreclosure was decreed and defendants were awarded $7,416.03 damages. Defendants appeal, claiming error in decreeing foreclosure and that the court used the wrong measure of damages. After de novo review, we affirm.

On March 1, 1977, the parties completed the sale of 279.25 acres of farmland for $212,000 from plaintiff vendor to defendants vendees. A $167,000 purchase money note and mortgage was given, payable in annual installments. Defendants made all payments until March 1, 1980, when they discovered plaintiff had previously conveyed an 18.5-acre tract. Plaintiff had forgotten that sale, and it did not appear on the abstract of title. Defendants computed their loss at $18,164 and tendered their check of $1,538.50 as payment of the $19,702.50 installment due March 1, 1980. Plaintiff refused the tender and this suit followed.

The facts are not in dispute except as they relate to land values and damages.

There is no merit to defendants' claim that they were not in default and that foreclosure is not a proper remedy. The law is well settled in Nebraska that under the pleadings, facts, and circumstances here, the mortgagee may proceed in foreclosure. See, *Musgrove v. Eskilsen,* 127 Neb. 730, 256 N.W. 883 (1934); *Mettlen v. Sandoz,* 131 Neb. 625, 269 N.W. 98 (1936).

Both parties agree that defendants are entitled to an abatement of a part of the unpaid mortgage debt, and they both cite as authority for the measure of damages *Ready Sand & Gravel Co. v. Cornett,* 184 Neb. 726, 733, 171 N.W.2d 775, 780 (1969): " '[W]here it appears that the vendor is unable to make a complete or perfect title, or that there is a deficiency in the quantity of land contracted to be sold, the general rule is that the vendee, if he so elects, it [sic] . . . entitled to have the contract specifically performed to the extent of the vendor's ability to comply therewith . . . and at the same time have a just abatement out of the purchase price for the deficiency of *title, quantity, or quality of the estate* to compensate for the vendor's failure to perform the contract in full. The vendee, in other words, may waive full performance and accept such title as the vendor is able to give, and if he chooses to do so, he has a right to that and to an abatement . . . . The measure of abatement should be such portion of the purchase price as the *relative value of the land lost bears to the purchase price of the whole tract.* At any event, abatement should be made upon the basis of the contract price.' " (Emphasis supplied.)

Defendants argue that a proper application of "abatement should be made upon the basis of the contract price" would be to compute damages for the average cost per acre, or $759 per acre. That is incorrect, although there might be some merit to that view if all of the land described in the contract being considered had the same value. The reference to the "contract price" is the constant $212,000

gross value factor fixed by the parties and the contract terms to which the values of the actual land or tracts of land conveyed and of the lost land are compared and related in value terms. See 71 Am. Jur. 2d *Specific Performance* § 134 (1973). During the trial, the court announced this measure of damages would be applied.

The evidence shows that the 279.25 acres had different soil types and farm uses, including, generally, 70 acres of irrigated cropland, 11 acres of dry cropland, 48 acres of meadow, 5 acres of grassland, 120 acres of pasture, 7 acres of turnrows, and the 18.5-acre tract not conveyed, which was sandy soil pasture adjacent to the Wood River, subject to flooding, and having some scrub tree growth. All witnesses said the 18.5-acre tract had the least value of any of the other land, and fixed its value from $200 to $550 per acre. The best land was the irrigated land, having a value of upwards of $1,250 per acre.

The land included in the contract has parts or units having unequal values by reason of either quality, adaptable use, productivity, or other relevant factors. Recoupment or measure of damages for the lost land is the value of the lost land compared to the value of the parts or units of land actually conveyed as all such values relate to the contract price.

In comparing these tracts of land and relating their values to the contract price, the trial court properly found the value of the 18.5-acre tract was $6,475 and that the total damages to defendants were $7,416.03.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES RAY BROWN, APPELLANT.
327 N.W.2d 107

Filed December 10, 1982. No. 81-916.

1. **Evidence: Witnesses: Juries.** The relative weight of conflicting evidence is necessarily determined by the credibility of the witnesses, which question is one solely for the jury which saw the witnesses and heard the testimony.
2. _____: _____: _____. The jurors are the judges of the credibility of the witnesses and the weight to be given to the testimony, and they have the right to credit or reject the whole or any part of the testimony in the exercise of their judgment.
3. **Verdicts: Appeal and Error.** This court will not interfere with a jury verdict of guilty based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger, for appellant.

James Ray Brown, pro se.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

HASTINGS, J.

The defendant was charged with first degree murder resulting from the June 17, 1981, shooting death of Claud V. Spencer in Omaha, Nebraska. However, upon trial to a jury he was convicted of second degree murder and sentenced to a term of 25 years in the Nebraska Penal and Correctional Complex. He has appealed to this court. The brief filed by his counsel assigns as the sole error that the evidence was insufficient as a matter of law to support the conviction. In a brief filed pro se, the defendant charges that a police officer destroyed evidence at

the scene of the crime. We affirm the conviction and sentence.

The defendant in his testimony admitted that he killed the victim. However, he testified that the killing arose out of a sudden quarrel. He said that during the argument the victim stated to the defendant that he would cut his throat. Then, according to the defendant, the victim pulled a large knife out of his pocket, which he opened and started slashing at the defendant. The defendant claims that he retreated out of the building where the argument began, but that the victim pressed on. Finally, the defendant said he pulled a revolver from his pocket, fired a warning shot into the ground, and when that did no good, he fired approximately five more shots. He claimed that the victim then just lay down on the street, raised back up, picked up his knife, which had fallen to the ground, closed it, and tried to return it to his pocket but it fell beside him. The victim apparently was dead when the police arrived minutes later.

The defendant's story is supported in substance by the testimony of several friends, Alfonzo Ray Hunter, Roosevelt Kirk, and Mar Haman.

However, there was other testimony which would support a finding that the argument, which had begun inside, broke off; that the defendant left and walked across the street; and later, after the victim came outside, unarmed, he was sought out by the defendant and shot a number of times.

Neb. Rev. Stat. § 28-304 (Reissue 1979) defines murder in the second degree as causing the death of a person intentionally, but without premeditation. Manslaughter is the killing of another without malice, upon a sudden quarrel. Neb. Rev. Stat. § 28-305 (Reissue 1979). The jury was instructed as to both first and second degree murder and manslaughter.

Although the evidence was conflicting, the jury resolved the conflicts against the defendant and in favor of second degree murder. The relative weight

of conflicting evidence is necessarily determined by the credibility of the witnesses, which question is one solely for the jury which saw the witnesses and heard the testimony. *Lee v. State,* 124 Neb. 165, 245 N.W. 445 (1932). The jurors are the judges of the credibility of the witnesses and the weight to be given to the testimony, and they have the right to credit or reject the whole or any part of the testimony in the exercise of their judgment. *State v. Godinez,* 190 Neb. 1, 205 N.W.2d 644 (1973). This court will not interfere with a jury verdict of guilty based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. *State v. Booth,* 202 Neb. 692, 276 N.W.2d 673 (1979). The evidence was sufficient to support a verdict of guilty of second degree murder.

The complaint raised in the pro se brief is wholly without merit. The defendant complains because one of the police officers, who first arrived at the scene, saw the victim lying on the ground with a billfold and a knife that was closed lying alongside the body. The officer testified that he placed the knife and billfold in the victim's pocket. The defendant claims that this amounted to destroying evidence. Such is not the case. The knife was offered in evidence at the trial. The officer testified that it was closed. This is consistent with the testimony of one or more of the defendant's own witnesses.

The judgment and sentence of the District Court is affirmed.

AFFIRMED.

Cite as 213 Neb. 71

IN RE ASSESSMENT OF OMAHA, LINCOLN AND BEATRICE RAILWAY COMPANY.

OMAHA, LINCOLN AND BEATRICE RAILWAY COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

327 N.W.2d 108

Filed December 10, 1982. Nos. 82-057, 82-058.

1. **Railroads: Assessments: Appeal and Error.** The review in this court of the assessment of railroad operating property made by the State Board of Equalization and Assessment is de novo on the record.
2. **Railroads: Valuation.** There are no infallible rules or criteria for the valuation of railroad property. Approximation is all that reasonably can be expected.
3. **Railroads: Valuation: Presumptions.** The presumption that a valuation made by a board of equalization is correct applies to the valuation of railroad property made by the state board.
4. **Railroads: Assessments.** The burden of showing the assessment was improper is on the complaining party.
5. **Railroads: Valuation.** Although the earnings of a railroad are evidence of importance in determining its value, the earning capacity of the railroad is of greater importance.

Appeal from the State Board of Equalization and Assessment. Affirmed.

James W. Hewitt, and Scott J. Norby of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellee.

BOSLAUGH, CLINTON, and HASTINGS, JJ., and CAMBRIDGE, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

The Omaha, Lincoln and Beatrice Railway Company (OL&B) has appealed from the orders of the State Board of Equalization and Assessment fixing the system value and assessment of the railroad for the years 1980 and 1981.

All operating property of a railroad in the State of Nebraska is assessed by the state board. Neb. Rev.

Stat. § 77-601 (Reissue 1981). The state board determined the system value of the railroad property to be $385,880 for 1980. The railroad filed a complaint alleging that the state board had failed to allow a sufficient amount for obsolescence and had not considered the earnings of the railroad. The complaint alleged that the system value should have been fixed at $193,501.94 for 1980.

In 1981 the state board determined the system value to be $413,142. The railroad again filed a complaint alleging the system value should have been fixed at $320,355.

After an evidentiary hearing on both complaints the state board fixed the system value of the railroad at $385,880 for 1980 and $413,142 for 1981. From these orders the railroad has appealed.

The review in this court is de novo on the record. Neb. Rev. Stat. § 77-617 (Reissue 1981); *Chicago, B. & Q. R.R. Co. v. State Bd. of Equalization & Assessment,* 170 Neb. 77, 101 N.W.2d 856 (1960).

The assignments of error are that the valuations fixed by the board were excessive and its action was arbitrary because it failed to take into consideration the gross or net earnings of the railroad.

"The subject of the valuation of railroads is a difficult one. Neither railroad commissioners, nor taxing authorities, nor courts have as yet arrived at settled or infallible rules or criteria for the ascertainment of actual value of such property. Approximation is all that can reasonably be expected." *Chicago, R. I. & P. R. Co. v. State,* 111 Neb. 362, 378, 197 N.W. 114, 120 (1923).

The railroad in question is a Class III switching and terminal railroad. It is wholly owned by Nebco, Inc., of Lincoln, Nebraska. The railroad has only 2.67 miles of track and two diesel-electric locomotives, a 1950 44-ton General Electric locomotive and a 1951 70-ton General Electric locomotive. In 1980 the railroad owned 191 open top hopper and ore cars,

and in 1981, 202 open top hopper and ore cars.

The railroad performs no line-haul service and there are only three industries located on its tracks: Far-Mar-Co., Inc., McGowan Grain, and Lincoln Ready Mix. All of its revenue is derived from switching services or railroad car rental.

The roadbed of the railroad is described as substandard and many of the cars are more than 25 years old and do not meet industry standards for interchange service.

In 1980 the railroad experienced a net operating loss for the fourth year in a row. At the initial hearing before the board, on July 7; 1980, Michael Heaton, a property tax specialist employed by the Nebraska Department of Revenue, testified that in determining the 1980 assessment for the railroad the department did not take into consideration the gross and net earnings of the railroad.

At the hearing on December 1, 1981, on the complaints filed by the railroad, Heaton again testified that the income of the railroad was not used in making the determination of the system value for 1980. Arlo Woolery, an expert witness called by the department, testified that he did not use the income reported by the railroad in his calculations.

Heaton testified that the value of a railroad usually is determined through income, cost, and market data approaches. The department did not use a market data approach because of the difficulty in finding a truly comparable railroad for comparison purposes and the railroad's capital stock is closely held. The railroad has no bonded indebtedness. The income approach was not used because of the difficulty in making adjustments to income which would have been necessary.

The department based its determination on the cost of equipment less depreciation as shown on the report, Form 41, filed annually with the department by the railroad. To this was added the value of the roadbed, calculated at $6.25 per foot of rail. The

total was then reduced by 20 percent for obsolescence.

The witnesses for the railroad at the hearing on the complaints were its secretary, vice president, and a securities analyst. The secretary testified as to the losses sustained by the railroad during the last 5 years and the values as shown on the books of the railroad. The net book value of road and equipment was $441,560. He testified that the property should be valued at $290,107.86 less one-third because of lack of profitability, leaving a system value of $193,501.94 for 1980 and $320,355 for 1981.

The securities analyst testified that the railroad company would have no significant appeal to an outside investor because of its lack of earnings. It was also his opinion that the company had no significant potential for growth.

An officer of a scrap metal company, called by the department, testified that the locomotive and cars owned by the railroad had a salvage value as scrap metal of $162,562.56 on January 1, 1980.

Heaton testified that he determined the system values of all railroads operating in Nebraska in 1980 and that the board adopted his recommended values. In valuing the railroads the same approaches were used where applicable. The income approach and the market data approach were not used in valuing the OL&B. The values were calculated from the Form 41 reports filed with the department by the railroads. He also consulted the R-3 form, a report filed with the Interstate Commerce Commission by the railroad, in making his determination. The obsolescence factor used in valuing the railroad was lower than the average factor applied to other railroads because much of the equipment, although used, had been purchased recently.

The department called as an expert witness Arlo Woolery, an appraiser with considerable experience in appraising railroad properties. At the request of the department Woolery made an appraisal of the

OL&B. Woolery testified that the value of the railroad by the cost approach was $573,600; by the market data approach, $421,500; and by the income approach, $415,000. He concluded that the market value of the railroad as of January 1, 1980, was $420,000.

As we view the record the valuation made by the board was not excessive. The presumption that a valuation made by a board of equalization is correct applies to the valuation of railroad property made by the state board. *Union P. R.R. Co. v. State Board of Equalization & Assessment,* 170 Neb. 139, 101 N.W.2d 892 (1960). The burden of showing the assessment was improper is on the complaining party.

We do not find the valuation evidence of the railroad to be persuasive. The only direct testimony as to valuation presented by the railroad was that of the secretary. The secretary admitted that he was not a qualified appraiser and gave no explanation as to why he believed the net book value of the property should be reduced $151,452.14 to arrive at $290,107.86, which should then be reduced by one-third because of lack of profitability.

"[T]he failure [of a railroad] to operate at a profit is not in and of itself conclusive evidence that the assessment of its property is unreasonable, nor does it operate to relieve the railroad from paying its proportion of the public tax burden." *Jersey City v. State Dept. of Taxation, &c.,* 136 N.J.L. 353, 356, 56 A.2d 479, 481 (1948).

Although we have said that "The earnings of a railroad are evidence of a most important character in determining the value of the railroad," *Chicago, B. & Q. R.R. Co. v. State Bd. of Equalization & Assessment,* 170 Neb. 77, 92, 101 N.W.2d 856, 866 (1980), it is the earning capacity of the railroad that is of greater importance. Earning capacity and actual earnings are not the same thing. It is what the property, efficiently managed, should have earned

that throws light on value. *Harris Trust & Savings Bank v. Earl,* 26 F.2d 617 (8th Cir. 1928).

Although it is true the witnesses for the department, Heaton and Woolery, testified they did not take into consideration the gross and net earnings of the railroad, as shown on its books, the witnesses did consider the earning capacity of the railroad. The railroad is a wholly owned subsidiary of Nebco, and the evidence suggests its profit and loss statement did not properly reflect its earning capacity. There was some evidence to the effect that the general administrative expense appeared to be excessive and certain car repair expenditures should have been capitalized rather than treated as expense items in computing the earnings of the railroad. The effect of such adjustments would be to increase the earnings of the railroad. The department witness Woolery called attention to the fact that from 1974 to 1979 the railroad had invested $718,769 in additional cars, and in the last 3 years, 1977 to 1979, $517,503 in cars and car repairs.

We conclude that the orders of the State Board of Equalization and Assessment fixing the system value and assessment of the railroad for the years 1980 and 1981 should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLINTON W. JOHN, APPELLANT.

328 N.W.2d 181

Filed December 10, 1982. No. 82-066.

1. **Conspiracy.** In determining whether a conspiratorial agreement exists, the defendant's conduct subsequent to the agreement and the circumstances surrounding the agreement may be considered by the jury.
2. _____. The function of the overt act in a charge of conspiracy is simply to manifest that the conspiracy is still at work.
3. _____. Under the provisions of Neb. Rev. Stat. § 28-202 (Reissue

1979), a person may be convicted of a conspiracy to solicit the commission of murder even though the person with whom he conspired feigned agreement and at no time intended to go through with the plan.

4. _____. Under the provisions of Neb. Rev. Stat. § 28-202 (Reissue 1979), an overt act done is an outward act done in pursuance of the conspiracy and manifests an intent or design looking toward the accomplishment of the crime. It need not of itself have a tendency to accomplish the object of the conspiracy and need not be an act which is criminal in itself.

5. **Indictments and Informations: Waiver.** An information charging an offense in substantially the words of the statute is generally sufficient. All defects that may be excepted to by a motion to quash are taken to be waived by a defendant pleading the general issue.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Affirmed.

Joseph Ginsburg of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon, and Baldwin & McKernan, for appellant.

Paul L. Douglas, Attorney General, and Mel Kammerlohr, for appellee.

BOSLAUGH, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

CLINTON, J.

The defendant was charged with the crime of criminal conspiracy as defined by Neb. Rev. Stat. § 28-202 (Reissue 1979), found guilty by a jury, and sentenced to a term of 1 to 5 years' imprisonment. On appeal to this court he assigns and argues the following errors, which allegedly occurred during the course of the trial, and that these mandate either a dismissal of the charges or a reversal and new trial: (1) The evidence was, as a matter of law, insufficient to establish the crime charged, hence the defendant's various motions for a directed verdict of acquittal should have been granted. (2) The trial court erred in failing to define the elements of criminal conspiracy. (3) The trial court erred in submitting to the jury for its consideration alleged overt acts which, as a matter of law, could not constitute

overt acts within the meaning of the statute, and in failing to specifically define overt act. (4) The court erred in giving instruction No. 5, which stated in part, "The conspiracy may exist even though the party with whom it is charged the defendant conspired, pretended or feigned agreement and did not in fact intend to follow through." (5) The trial was conducted in a manner which, in several respects, prevented the defendant from having a fair trial, namely, (a) wholly hearsay and gratuitous remarks of witnesses were admitted; (b) the trial court received in evidence tape recordings of conversations of the defendant with an undercover agent posing as a hit man, as well as transcriptions of those conversations, which resulted in undue emphasis of that evidence; and (c) the transcript and tape recordings contained erroneous and prejudicial introductory information.

A consideration of the assignments of error makes it necessary that we first set forth the pertinent portions of the statute under which the defendant was charged, the charges as set forth in the information, and a summary of the evidence.

Section 28-202 provides in part: "(1) A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony:

"(a) He agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and

"(b) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy."

The information charged: "Clinton W. John . . . did, on or about the 4[th] day of June A.D. 1981, in the County of Hall and the State of Nebraska aforesaid, with the intent to promote or facilitate the commission of first degree murder, did then and there, agree with one or more persons that they or one or more of them would engage in, solicit, or cause the

first degree murder of Barbara John, and that Clinton W. John did commit overt acts in pursuance of the conspiracy, to-wit:

"1. Clinton W. John, on June 4, 1981, provided a business card which listed his name and phone number to an individual whom he had asked to contact a person who would contract to kill Barbara John;

"2. Clinton W. John, during a telephone conversation on June 5, 1981, with an individual purporting to be a killer for hire, discussed arrangements for an in-person meeting and agreed to another telephone conversation the next day to arrange an in-person meeting with said individual;

"3. Clinton W. John made arrangements on June 6, 1981, during a telephone conversation with an individual purporting to be a killer for hire, to meet said individual on June 6, 1981, at 2:15 p.m. in the parking lot of the Interstate Holiday Inn in Hall County, Nebraska;

"4. Clinton W. John drove a pickup truck on June 6, 1981, to the Interstate Holiday Inn in Hall County, Nebraska, for the purpose of meeting an individual who purported to be a killer for hire;

"5. Clinton W. John met an individual purporting to be a killer for hire on June 6, 1981, at about 2:15 p.m. in the parking lot of the Interstate Holiday Inn in Hall County, Nebraska, and discussed with said individual methods, plans and arrangements for the first degree murder of Barbara John;

"6. Clinton W. John on June 6, 1981, gave an individual purporting to be a killer for hire a slip of paper which listed the probable itinerary his wife, Barbara John, and their two children would take on a vacation which was planned to begin in the next several days, and which also listed the make, model and year of the automobile Barbara John would be driving, and which also listed the location and names of motels where Barbara John and their children would be likely to stay during said vacation;

"7. Clinton W. John on June 6, 1981, gave an in-

dividual purporting to be a killer for hire pictures of the two John children so they could be identified by said individual and would not be harmed in any attempts to murder Barbara John by said individual; and

"8. Clinton W. John met with an individual purporting to be a killer for hire on June 6, 1981, at about 4:30 p.m. in the area of the Interstate Holiday Inn in Hall County, Nebraska, and agreed to have said individual telephone him in 30 days to further discuss the murder of Barbara John by said individual."

The State introduced evidence which tended to establish the following facts. On June 4, 1981, the defendant John and his wife, Barbara, were separated and an action for divorce was pending. John operated a business in Grand Island, Nebraska, and at that time lived at his place of business in an office which he had converted into a bedroom. On about June 3, 1981, the defendant John had dinner with an acquaintance from Minnesota, one Hanauer, and two other men, apparently Grand Island residents. Hanauer made a hobby of gun collecting, as did John.

Hanauer testified that, following the dinner, John approached him in private and said that he had a problem but did not want to discuss it at that time and asked Hanauer to come by the office the next day. Hanauer went to John's office the next morning as requested. At that time a conversation occurred between them. According to Hanauer, John asked him if he knew where he could get an unregistered gun and where he could find someone to dispose of his wife. To the latter question Hanauer answered "No." At that time John said, "This conversation is now ended." Hanauer stated that as they walked to the door he became nervous and frightened. His thought, as indicated by inference from later testimony, apparently was that, since John had disclosed a possible intention to mur-

der his wife, he (Hanauer) might himself be in danger if the plan were actually carried out. At that time he turned to John and said, "Well, maybe I do know somebody." He then asked for John's card, and John gave him two. Hanauer testified that the more he thought about the matter the more concerned he became. He returned to Minnesota that day. When he reached home he called the sheriff's department, made an appointment for the following day, and disclosed the nature of his conversations with John.

At trial John, who took the stand in his own behalf, did not deny that a conversation had taken place in the office which he had converted into a bedroom, but gave a different version of the conversation and gave it different import. John stated he knew that Hanauer had a gun collection worth millions and that he asked Hanauer only three questions. John testified, "[M]y first statement to him was, 'You know a lot of people that have guns'. His answer was, 'Yes'. . . . I then asked him, I said, 'Do you know people that use guns'. His answer was, 'Yes'. . . . The third question I asked Mr. Hanauer was, 'Do you know people that use guns to eliminate people'. Q. What was his response? A. His response was an emphatic, 'No'. With that I said, 'Fine'. I then opened the door and started to leave my office. Then, as the door was opened and he was about out of the door he said, 'Wait a minute'. So I turned around, closed the door and he said, 'I might know somebody that knows somebody'. I might add that at no time during the conversation did I ever mention my wife, not her name or anything to do with our upcoming divorce. Q. Mr. John, what was your purpose in asking the man these questions? A. Basically, my purpose was to ask him these questions in regard to the same weapons that I had requested information from him and had never gotten, previously on the old — to use the names of the weapons, they're the American Thompson sub-

machine gun, the British Sten gun, I believe it's called and the German Burp gun. Basically, these were guns used in the Second World War by our troops when they went in against the Germans in Europe?" John admitted that on that occasion he might have given Hanauer one or more business cards, although he was sure that he had previously given Hanauer business cards also.

Hanauer kept the appointment with the St. Cloud, Minnesota, sheriff's department and advised one of the sheriff's deputies of his conversation with John. He told the officer that he wanted no part of the matter and related his fear for his own safety. The deputy to whom Hanauer spoke then, with Hanauer's knowledge, contacted the Hall County sheriff's office, told the sheriff's deputy of the information he had received, and later transmitted, with a memo, one of the business cards which Hanauer stated he received from John.

Upon receipt of this information the Hall County sheriff's department contacted a sergeant at the criminal investigation division of the Nebraska State Patrol. Between them it was decided that an undercover agent of the State Patrol should play the part of a hit man who had been contacted by Hanauer and get in touch with John. This was done immediately and a telephone conversation between John and the undercover agent Zeleski, a regular employee of the State Patrol, took place. There were subsequent telephone conversations and meetings between the two. With the exception hereinafter noted, all of these conversations were tape recorded and later transcribed. Zeleski supervised the transcription by listening to the tapes, supplying parts which were inaudible, and, as will be observed, supplying parenthetical material. Both the tapes and the transcriptions were received in evidence at the trial, with the foundation being laid by the testimony of Zeleski. These conversations and meetings constitute the basis of the various overt

acts (with the exception of the first, i.e., John's handing the business cards to Hanauer) charged in the information. The meetings between the two were corroborated by the surveillance of an officer of the Nebraska State Patrol and photographs which were taken. In addition, one of the conversations at a meeting between Hanauer and John was monitored by a remote receiver.

We summarize and/or quote the contents of the conversations that took place at the various meetings between John and Zeleski. The first was a telephone conversation which occurred on June 5, 1981, at about 9:15 p.m., when Zeleski called John at his place of business. The following is a verbatim transcription of the recorded conversation:

"Mr. John: Hello.

"Inv. Zeleski: Yes, Mr. John?

"Mr. John: Yes.

"Inv. Zeleski: Ah, you don't know me, but I was contacted this morning, ah, by well, let's say a friend of a friend from Minnesota.

"Mr. John: Uh-huh.

"Inv. Zeleski: Who stated that you were having some problems that I might be able to help you with. I understand that you were becoming a little bit tired of sleeping in your office.

"Mr. John: That's right.

"Inv. Zeleski: And ah, he stated that, ah, I should contact you and visit with you and ah, I might possibly be able to help you with your situation.

"Mr. John: I think you may very possibly could. Now, the best thing, ah, are you calling long distance?

"Inv. Zeleski: Yes, I am.

"Mr. John: OK. Ah, you have my card?

"Inv. Zeleski: No, I, I haven't, ah, seen the card or anything. I was contacted by telephone. Ah.

"Mr. John: Oh, I see. OK.

"Inv. Zeleski: Tell ya, I'm going to the west coast. Have to be there by the middle of next week.

"Mr. John: That, that's all very.

"Inv. Zeleski: You are in Grand Island, Nebraska, is that correct?

"Mr. John: Right. All this fits in very beautifully.

"Inv. Zeleski: OK, ah, I can probably be in Grand Island sometime, ah, oh, I think probably after noon tomorrow. Sometime in the afternoon, I believe.

"Mr. John: Sometime after noon tomorrow, that will be fine. You have my phone number, give me a call. I'll either meet you at the airport and ah, we can discuss things then or ah, wherever you want to meet."

They then made arrangements for a call back by Zeleski to John's office between noon and 2 p.m. The conversation then continued:

"Inv. Zeleski: Then, when I get you, I'll, we can make arrangements to get together.

"Mr. John: You bet. That would be wonderful.

"Inv. Zeleski: OK?

"Mr. John: Very good.

"Inv. Zeleski: We'll talk later.

"Mr. John: Thank you."

The followup conversation occurred on June 6, 1981, at 1:36 p.m. In that conversation the parties arranged for the time and place for a personal meeting. They agreed upon the parking lot at the Interstate Holiday Inn. Zeleski gave information by which John could identify him. The telephone conversation continued:

"Inv. Zeleski: If, if, ah, you could maybe bring a picture of your problem along and ah, possibly get ahold of Mr. Green and get some expense money, we can probably get things started here pretty quick.

"Mr. John: OK, fine. Ah, I was just trying to think about the picture here, where I might get one, here. Well, let me, let me worry about that, I'll, anyway about 2:15?

"Inv. Zeleski: Ya, there abouts.

"Mr. John: I'll catch you out there, then."

The meeting was kept as arranged. Zeleski suggested they go for a ride and asked if John objected. We now quote from the transcript:

"Mr. John: Hell, no. That's why I tried to bring one of our company pickups and we've got this old rough and ready that I always drive, drive in. Nobody knows that I'm just going out to help a man fix a tractor.

"Inv. Zeleski: There you go!

"Mr. John: Chain saws in back.

"Inv. Zeleski: Shit, little cars, damn things. (inaudible) Well, I was contacted like I said, by a, we'll just say a friend of a friend.

"Mr. John: Ya, ya, there is no sense of going into that now.

"Inv. Zeleski: You can give me the details when we get into it."

Zeleski then indicated he would need money. We again quote from the transcript.

"Mr. John: (interrupting or talking at the same time — I'm not, I'm not) See, the best part of it is you don't have to stay in town.

"Inv. Zeleski: Well, I don't.."

John then explained he could not get a picture of his wife as he never carried one, but he would furnish a picture of the two children. He then furnished Zeleski with an itinerary of the vacation which his wife and children were about to take, which itinerary he had secured from his son. We now return to the transcription:

"Mr. John: I just copies down what he gave me and ah — because my wife wants me to know as little as possible, and ah, but anyway these are what she gave him to give to me.

"Inv. Zeleski: Why don't you read that to me.

"Mr. John: OK.

"Inv. Zeleski: I gota [sic] drive here.

"Mr. John: Leaving Monday morning and, ah — they plan to be in Raton, New Mexico Monday night. They plan to be in Santa Fe Tuesday thru Thrusday

[sic], and in the Grand Canyon Friday thru Sunday. Then driving home on Monday or Tuesday. Then, she has written here, will call Grandad when we know where we're staying. Now that's her father, but I am sure ah, they might tell me, but, ah, then again they might not.

"Inv. Zeleski: All right.

"Mr. John: Then she has written underneath that — possibly the La Pasada, anyway, Inn in Santa Fe and the Grand Canyon Lodge in the Grand Canyon. OK, here is what they drive. She'll be driving a 1977 white Granada four-door sedan with a maroon vinyl top with a bike rack on the back with one or two bikes, probably a 10-speed, a burgandy [sic] colored 10-speed, and, ah, one of these new red racing bikes that my son races, you know bicycles.

"Inv. Zeleski: OK.

"Mr. John: And the license number on the car is 8-3888.

"Inv. Zeleski: You want to, ah, either on that or on this or something, write down a physical description of her.

"Mr. John: Five foot one.

"Inv. Zeleski: You don't have a picture of her in the house or anything?

"Mr. John: Well, there in the house but I can't get in the god damn house until, till after they leave.

"Inv. Zeleski: You want to write down what she looks like, so I will have it. I mean cause, I don't know, you know.

"Mr. John: Ya."

John then gave Zeleski a general description of Mrs. John and wrote it on the back of the itinerary. He then gave Zeleski pictures of the children, stating he did not want either of them involved and that he wanted the pictures back eventually. The conversation continued:

"Inv. Zeleski: Is there anything in particular you had in mind, ah, that, ah.

"Mr. John: Well when you, when you say — like had in mind.

"Inv. Zeleski: Well, to, like you know.

"Mr. John: Well, if it could be made to look like an accident, fine. So much the better is all I'm getting at.

"Inv. Zeleski: What do, ya, a traffic accident, you mean.

"Mr. John: Traffic accident, a holdup in a store, ah, somebody shot by mistake, etc. etc. If you see what I am getting at.

"Inv. Zeleski: OK, sure. Now is she going to be traveling at anytime, do you know, by herself without the children?

"Mr. John: This, I don't know. This is why my son is taking his bicycle. I doubt.

"Inv. Zeleski: Do you have relation or does she have relation down there or anything, or anything? Huh?

"Mr. John: None (pause)

"Inv. Zeleski: Um?

"Mr. John: At least if she does, there is none that I've known about. I take it you don't smoke?

"Inv. Zeleski: Oh, go ahead. I used to, but I started losing my wind so I had to quit. (laughs) Well, let me ask you this, the way, the way this situation is, ah, do you just as soon that, that she got out of town?

"Mr. John: Absolutely, the farther, the farther away, the better. Because, see whats happened, to give you a brief rundown. . . ."

Then followed a recital by John of his marital troubles, including what he referred to as his wife's unreasonable financial demands and John's expression of opinion that the judge might yield to them. The conversation then turned to charges for Zeleski's services.

"Mr. John: Oh, I am not, I am not asking, I was just trying to get you to give me basic lump, to know what I have to come up with, cash dollars. Be-

cause that is the only way you probably want it anyway.

"Inv. Zeleski: Ya. I don't take Mastercharge.

"Mr. John: No, no Mastercharge or checks or anything else, and first of all, I wouldn't want to give it to you that way because then the son-of-a-bitch is traceable.

"Inv. Zeleski: Ya. I am going to have to have a $1000 to start with.

"Mr. John: Uh-huh.

"Inv. Zeleski: Ah, with the ah, traveling, I'm going to have to, to, ah, you know, I, I want to, I am going to be honest with you, I am not going to take you for a ride.

"Mr. John: Well, hell, ya.

"Inv. Zeleski: I got no, I got no reason.

"Mr. John: Hell no, this is, this is your.

"Inv. Zeleski: I need a $1000 and as soon as I get that, I will get started. I like to get things over with as fast as I can.

"Mr. John: Uh-huh.

"Inv. Zeleski: And be on my way. So, $1000 when I get started and if my expenses [sic] over that, you cover the balance of the expenses when I'm done, the other thousand dollars.

"Mr. John: Uh-huh.

"Inv. Zeleski: And ah, you know, if the expenses, you say run over $500, ah..

"Mr. John: You mean, you talk about running over the two thousand or so?

"Inv. Zeleski: Well, I'm figuring $500 expenses out of the first $1000.

"Mr. John: Ya.

"Inv. Zeleski: Then, if they run over that..

"Mr. John: Well, I can, I can understand your position, ya..

"Inv. Zeleski: You know, I'll ah, contact you and you know, because you — hey, I am not, I, I am not, a fortune teller, I don't know what is going to happen here.

"Mr. John: Well, no, hell no.

"Inv. Zeleski: I've got to have money to operate on. That's it.

"Mr. John: OK."

John then began a discussion with Zeleski of the possibility of just "riding it out," that is, taking a chance that the judge in the divorce action would not grant Mrs. John's financial requests. That discussion continued for some minutes. The tape then ran out and the balance of the conversation was not recorded. Zeleski testified that he realized when the recording ran out because the recorder emits a whine, which he covered by fiddling with the radio. He testified to the balance of the conversation, which related to the total amount of $2,000 that Zeleski would charge and the methods to be used. John expressed fear of blackmail by Zeleski at a later time and received assurances from Zeleski. Zeleski discussed specific methods by which the slaying might be carried out. John stated he wanted the children kept out of it. No method was agreed upon. They then agreed to a meeting later that day at 4:30 p.m.

The continuation meeting between John and Zeleski was held as scheduled. After some introductory remarks, the following conversation took place, as indicated by the transcription:

"Mr. John: Well, anyway, I think what I am going to do is, I'm gonna ride this son-of-a-bitch out, and wee [sic] what the hell happens and ah, the only thing that worries me is, ah, how the hell I can get ahold of you (inaudible).

"Inv. Zeleski: Well.

"Mr. John: The same route.

"Inv. Zeleski: I could have somebody call you, you know, whatever you want.

"Mr. John: Well, lets just, lets just put it a month from now. OK, now, would it be best that I got the pictures back and that stuff.

"Inv. Zeleski: Yes, if you want them.

"Mr. John: Ya, why don't I, cuz those are the only things I, keep the itinerary if you want it. I don't need it, I have a copy of it.

"Inv. Zeleski: Well, if you, ah you know, if you want me to do something yet this week (inaudible), ah, well if you don't want me to do anything, I am just going to go ahead and go out west. You know, ah.

"Mr. John: Well, for right now, for right now, I would say that's the way, that's the way it would stand, but, ah, see I am so god damn involved here in Grand Island that, ah, I am talking about the meetings, you know, and all that shit. The timing, even if it was here T.J., would make no difference at all. I'd have better, I'd almost have better cover then [sic] I would if something happened there, you follow me?

"Inv. Zeleski: Ya."

John then indicated to Zeleski that he (John) would check with his attorneys to find out how the divorce settlement was going. Then followed this statement:

"Mr. John: If, ah, if we can, I, I don't, let me put it this way, I sure as hell don't want to lose ya. Ah.

"Inv. Zeleski: Well.

"Mr. John: But, ah —

"Inv. Zeleski: Well, you can, you want me to contact you, whenever, 30 days from today?

"Mr. John: Let's just make it that way and see what the hell is going on."

After a rather meandering conversation they concluded that Zeleski would contact John in 30 days, with Zeleski saying, "if you want to call it quits," it was OK, but that he would want to get his expense money. To this John replied, "OK." Later in the conversation John was apologetic for not having money with him as he usually did, explaining that on Saturday afternoon he could not cash a check. The conversation then continued on a social note, with John inviting Zeleski to go fishing with him and his

buddies anytime. They parted with Zeleski saying, "Don't do anything for Christ's sakes."

When John, at trial, took the stand on his own behalf he did not deny the various meetings with Zeleski or challenge the contents of their various conversations. He explained that he was astounded when he received the first call from Zeleski. He explained his consenting to and his participation in the meetings with Zeleski by stating that he was curious to find out what a hit man was like.

It is apparent, however, the jury did not accept John's explanation, and that seems quite understandable in light of the fact that it is perfectly clear, despite the ambiguity of Zeleski's first approach to John, that John realized he was being contacted by a hit man. John also testified that after his first conversation with Zeleski he discussed the matter with two advisers, who told him to have nothing to do with the fellow. He testified he disregarded the advice because of his curiosity. John did not attempt to offer the testimony of these two advisers.

The defendant's first assignment of error contains two contentions, namely, (1) there was insufficient evidence to establish the agreement and (2) no conspiracy can exist when one of the parties is feigning the agreement. The basis for the State's charge of conspiracy is clearly founded upon the conversation between the defendant and Hanauer on June 4, for that is the date stated in the information.

Which version of the conversation the jury might have believed and whether the agreement, if made, constituted an agreement between John and Hanauer that "one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified," to wit, the first degree murder of Barbara John, need not have been viewed by the jury solely on the basis of what occurred in the transaction which allegedly constituted the agreement, but also in the light of the defendant's subse-

quent conduct. The rule in Nebraska is that the nature of the agreement may be inferred from the defendant's conduct subsequent to the agreement and to the circumstances surrounding it and may be proved by circumstantial evidence. *Beyl v. State,* 165 Neb. 260, 85 N.W.2d 653 (1957); *State v. Knecht,* 181 Neb. 149, 147 N.W.2d 167 (1966); *United States v. Hayutin,* 398 F.2d 944 (2d Cir. 1968). The function of the overt act in a charge of conspiracy is simply to manifest that the conspiracy is still at work. *Yates v. United States,* 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1956).

Disregarding for the moment the fact that Hanauer was feigning the agreement, the jury was entitled, under the above authority, to consider John's subsequent conduct in determining whether an agreement existed and the nature thereof. We hold that the evidence was sufficient for the jury to determine beyond a reasonable doubt that John and Hanauer entered into an agreement which John understood was an agreement by Hanauer to "solicit" a hit man for the purpose of carrying out the first degree murder of Barbara John. Under the provisions of the plain language of § 28-202, the agreement may be either to "engage in" the conduct or "solicit" the conduct. Hanauer's version of the conversation and John's subsequent conversations and transactions with the "hit" man, if believed by the jury, do establish that John agreed to have Hanauer solicit someone to murder his wife.

We now turn to the second question of whether, under the provisions of § 28-202, two people must actually agree to the criminal conduct necessary to constitute the first element of a conspiracy, or whether agreement by the defendant and a feigned agreement by the alleged coconspirator is sufficient. Prior to the adoption of § 28-202 in 1977, the Nebraska statute defining a conspiracy read: "If *two* or more persons conspire to commit any felony . . . and one or more of such parties do any act to effect the

object of the conspiracy . . . ." (Emphasis supplied.) Neb. Rev. Stat. § 28-301 (Reissue 1975). It is not controverted that under the former statute the conspiracy or agreement must be actual and made by two or more people. The State takes the position in this case that under the provision of § 28-202, which was adopted from Model Penal Code § 5.03 (Tentative Draft No. 10, 1960), the unilateral approach of the agreement element of conspiracy has been adopted, and under that approach only the defendant need agree with another; the second party can feign the agreement and the conspiracy may exist.

There are significant differences in the language of the two statutes. The former provided, "If two or more persons conspire . . . ." The present statute says, "A person shall be guilty . . . if, with intent . . . (a) He agrees . . . ." The commentary to § 5.03 of the Model Penal Code, *supra* at 104-05, says: "2. *The Conspiratorial Relationship.*

"*Unilateral Approach of the Draft.* The definition of the Draft departs from the traditional view of conspiracy as an entirely bilateral or multilateral relationship, the view inherent in the standard formulation cast in terms of 'two or more persons' agreeing or combining to commit a crime. Attention is directed instead to each individual's culpability by framing the definition in terms of the conduct which suffices to establish the liability of any given actor, rather than the conduct of a group of which he is charged to be a part—an approach which in this comment we have designated 'unilateral.'

"One consequence of this approach is to make it immaterial to the guilt of a conspirator whose culpability has been established that the person or all of the persons with whom he conspired have not been or cannot be convicted. Present law frequently holds otherwise, reasoning from the definition of conspiracy as an agreement between two or more persons that there must be at least two guilty con-

spirators or none. The problem arises in a number of contexts.

. . . .

"*Second:* Where the person with whom the defendant conspired secretly intends not to go through with the plan. In these cases it is generally held that neither party can be convicted because there was no 'agreement' between two persons. Under the unilateral approach of the Draft, the culpable party's guilt would not be affected by the fact that the other party's agreement was feigned. He has conspired, within the meaning of the definition, in the belief that the other party was with him; apart from the issue of entrapment often presented in such cases, his culpability is not decreased by the other's secret intention. True enough, the project's chances of success have not been increased by the agreement; indeed, its doom may have been sealed by this turn of events. But the major basis of conspiratorial liability— the unequivocal evidence of a firm purpose to commit a crime—remains the same."

A number of states have adopted the Model Penal Code language. The following cases, among others, hold: Under a statute providing that if a person conspires with another to commit a crime, and in furtherance of the conspiracy one or more of the parties does some overt act in furtherance of such conspiracy, he may be guilty of conspiracy even though the person with whom he conspired feigned agreement and at no time intended to go through with the plan. *State v. St. Christopher,* 305 Minn. 226, 232 N.W.2d 798 (1975); *State v. Marian,* 62 Ohio St. 2d 250, 405 N.E.2d 267 (1980); *Garcia v. State,* ____ Ind. ____, 394 N.E.2d 106 (1979).

We believe it is clear that § 28-202 adopts the unilateral approach.

The defendant argues that our Legislature did not adopt the unilateral approach because it did not also adopt Model Penal Code § 5.04 (Proposed Official

Draft, 1962), which reads in part as follows at 86: "(1) Except as provided in Subsection (2) of this Section, it is immaterial to the liability of a person who solicits or conspires with another to commit a crime that: (a) he or the person whom he solicits or with whom he conspires does not occupy a particular position or have a particular characteristic which is an element of such crime, if he believes that one of them does; . . . ." An examination of § 5.04 indicates that its language does not support the defendant's position and is, in fact, irrelevant to the unilateral approach as set forth in our statute. Section 5.04 pertains only where the person whose status is an element of the crime does not occupy a particular position or have a particular characteristic which is an element of the crime, if he believes that one of them does. That language is quite consistent with the unilateral approach and, in fact, carries it a step further. It provides that the unilateral approach applies even when one of the necessary elements of the contemplated crime which is the object of the conspiracy may be missing. For example, assume a crime of conspiracy to bribe a public official. The effect of § 5.04 of the Model Penal Code would be that the crime is committed if the defendant only believes the person to be bribed holds the requisite office, but in fact does not. Apparently our Legislature did not wish to change the substantive element of crimes other than conspiracy and hence did not adopt § 5.04. The defendant's contention that the evidence is insufficient to support the verdict is not meritorious.

The defendant's second assignment of error is wholly frivolous. The trial court did define the crime in the exact language of the statute.

In determining the merits of the defendant's third assignment, it becomes necessary to discuss the nature of an overt act. An overt act is such as tends to show the preexisting conspiracy. *Platt v. State,* 143 Neb. 131, 8 N.W.2d 849 (1943). It is an outward act

done in pursuance of the conspiracy and manifests an intent or design looking toward the accomplishment of the crime. *Chavez v. United States,* 275 F.2d 813 (9th Cir. 1960). It need not of itself have a tendency to accomplish the object of the conspiracy. *Hall v. United States,* 109 F.2d 976 (10th Cir. 1940). It need not be an act which is criminal in itself. *Yates v. United States,* 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957); *Braverman v. United States,* 317 U.S. 49, 63 S. Ct. 99, 87 L. Ed. 23 (1942). See, also, *Collier v. United States,* 255 F. 328 (5th Cir. 1918); *United States v. Sarno,* 456 F.2d 875 (1st Cir. 1972); *State v. Stanley,* 123 Ariz. 95, 597 P.2d 998 (1979).

The various overt acts charged in the information, all of which find support in the evidence, are, in the light of the principles cited, overt acts within the meaning of the law, and the court did not err in submitting them to the jury. We will discuss just a few of the acts charged. The giving of the business cards with name, address, and telephone number of John afforded to Hanauer a convenient means for the hit man or Hanauer to later contact John. The meetings with the alleged hit man were clearly overt acts. The furnishing of the vacation itinerary of Barbara John, the description of her car, and her physical description were actual steps toward accomplishment of the ultimate purpose.

Assignment (4) is inherent in assignment (1) and has already been disposed of.

Although not specifically assigned as error, the defendant argues that the information was insufficient and should have been quashed because it did not identify the alleged coconspirator. The motion to quash was based upon the allegation that the information stated no crime, for the reason the statute was unconstitutional because the statute was vague and indefinite. The motion to quash did not raise the issue of a defect in the information for failure to name the coconspirator. On the same day the mo-

tion to quash was overruled, the defendant entered a plea of not guilty. The applicable rules are: An information charging an offense in substantially the words of the statute is generally sufficient. All defects that may be excepted to by a motion to quash are taken to be waived by a defendant pleading the general issue. *State v. Abraham,* 189 Neb. 728, 205 N.W.2d 342 (1973). The defendant's contention that the information should have been quashed because of failure to allege the identity of the coconspirator is without merit.

As to the claimed multifarious errors listed in assignment (5), which allegedly prevented the defendant from having a fair trial, we conclude, after carefully examining the whole record, that either the alleged errors were not error at all, were not raised by proper objection, or were beyond a reasonable doubt not prejudicial and could not have affected the outcome of the trial.

AFFIRMED.

McCOWN, J., participating on briefs.

CAROL E. RUDEL, APPELLANT, V. RODELL RUDEL, APPELLEE.

327 N.W.2d 46

Filed December 10, 1982. No. 82-344.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

Kelley, Wallace, Scritsmier, Moore, Romatzke & Byrne, P.C., for appellant.

Murphy, Pederson, Piccolo & Anderson, for appellee.

KRIVOSHA, C.J., BOSLAUGH, McCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

This appeal involves a domestic relations matter. The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

IN RE ESTATE OF HARRY W. CARMAN, DECEASED. EDWARD AXMANN ET AL., APPELLANTS AND CROSS-APPELLEES, V. AMANDA CARMAN, APPELLEE AND CROSS-APPELLANT.

327 N.W.2d 611

Filed December 17, 1982. No. 44419.

1. **Decedents' Estates: Wills: Appeal and Error.** A challenge to a spouse's statutory election to take against a will is tried in this court de novo on the record.
2. **Decedents' Estates.** The combined effect of the statutory elective share and augmented estate concepts is intended to protect the surviving spouse of a decedent against donative inter vivos transfers by devices which would deprive the survivor of a "fair share" of the decedent's estate and at the same time prevent the surviving spouse from receiving more than such share by allowing the acceptance of certain transfers and insurance proceeds and also yet elect against the will.
3. _____. In the absence of an express contract to compensate a spouse for extra and unusual services, no obligation to do so will be implied.
4. _____. A spouse's labor does not, absent a contract, become a contribution "in money's worth" such as to take one-half the value of jointly produced and acquired assets out of the computation of the augmented estate.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed in part, and in part reversed and remanded with directions.

John S. Mingus of Mingus & Mingus, for appellants.

Tye, Worlock, Tye, Taylor & Hopkins, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

CAPORALE, J.

In this appeal the appellants, Edward Axmann, Elaine Dobish, and Shirley Tesmer, grandnephew and grandnieces of the deceased Harry W. Carman, challenge the District Court's computation of the decedent's augmented estate. The appellee, Amanda Carman, surviving spouse of the decedent, cross-appeals, also claiming error in the District Court's computation of the augmented estate and further in its determination that there was no adequate showing of need for a supplemental family allowance to her. We affirm in part and reverse in part.

In general, the deceased's last will and testament devised to Mrs. Carman a life estate in certain described real estate. All the rest, residue, and remainder of the real estate was devised, in equal shares, to the appellants. The personal property was bequeathed to one Robert Downey, in trust, to pay the income to Mrs. Carman and to distribute the corpus, upon her death, to the appellants, in equal shares.

Mrs. Carman elected to take against the will under the provisions of Neb. Rev. Stat. § 30-2313(a) (Reissue 1979), which provides that the surviving spouse has a right to take an elective share of one-third of the augmented estate. Neb. Rev. Stat. § 30-2314 (Reissue 1979), so far as material here, basically defines the augmented estate as the probate estate, less certain allowances, plus the value of property owned by the spouse at the decedent's death and which would have been includable in the surviving spouse's augmented estate if that spouse had predeceased the decedent, to the extent the owned property was derived by the surviving spouse from the decedent without a full consideration in money or money's worth.

We have in the past stated that a challenge to a

statutory election is tried in this court de novo on the record. *In re Estate of Bergren,* 154 Neb. 289, 47 N.W.2d 582 (1951). We therefore so review the instant matter.

The combined effect of the statutory elective share and augmented estate concepts is intended to protect the surviving spouse of a decedent against donative inter vivos transfers by devices which would deprive the survivor of a "fair share" of the decedent's estate and at the same time prevent the surviving spouse from receiving more than such share by allowing the acceptance of certain transfers and insurance proceeds and also yet elect against the will. Nebraska Probate Code, Part 2, Comments, §§ 30-2313 to 30-2315.

Appellants claim that the augmented estate computation in this case should include all the real estate held by the decedent and appellee as tenants in common, all the items of farm production, and certain other items of personalty. The appellee, on the other hand, urges that only one-half of the tenancy in common real estate, items of farm production, and the other items of personalty should be included; the other one-half being her own and separate estate.

The decedent and appellee were married in November 1959. Decedent was about 50 years old and appellee was about a year younger. It was the first marriage for each; no children were born to the marriage. Appellee and appellants are the decedent's only heirs.

Prior to the marriage appellee had been working as a general cleaning woman in Kearney and continued to do so for a period of time following the marriage. Prior to the marriage the decedent had been engaged in a general farming operation and continued to so be after the marriage. Subsequently, the two parties jointly conducted the farming operation for the duration of the marriage. Various evidence was introduced concerning the work done by appellee in the farming operation. She partici-

pated in such chores as raising chickens, selling eggs and fryers, milking cows, and separating and selling cream. She also purchased some milk cows, fed cattle and hogs, scooped grain, put up hay, and chopped sunflowers, cockleburs, and musk thistles by hand. Additionally, she fixed fence, drove tractors, and stacked hay bales, as well as helping to repair and weld machinery, repairing and reshingling farm buildings, and assisting in the butchering process, including the cutting up of all the meat by herself.

From these facts appellee argues that she did more than merely perform as a farmwife; that in fact she functioned as a partner in the farming operation, or in any event did at least as much as would a hired hand; and, thus, one-half of the items of farm production and other items of personalty were to be treated as being owned by her outright. We, as did the District Court, disagree.

The question becomes whether appellee's labor as above described constitutes a contribution "in money's worth" such that one-half the value of the farm production and jointly acquired personalty should be excluded from the augmented estate and set over to appellee as her own property. Notwithstanding the cases cited to us which adopt that point of view for tax purposes (*Craig v. United States,* 451 F. Supp. 378 (D.S.D. 1978); *In re Estate of Kersten,* 71 Wis. 2d 757, 239 N.W.2d 86 (1976); *Est. of Everett Otte,* 41 T.C.M. 72,076 (P-H 1972)), we adhere to our traditional view that in the absence of an express contract to compensate a spouse for extra and unusual services, no obligation to do so will be implied. See, *Peterson v. Massey,* 155 Neb. 829, 53 N.W.2d 912 (1952); *Brodsky v. Brodsky,* 132 Neb. 659, 272 N.W. 919 (1937). Accordingly, a spouse's labor does not become a contribution "in money's worth" such as to take one-half the value of jointly produced and acquired assets out of the augmented estate computation.

Next, Mrs. Carman argues that her extraordinary labor, coupled with the fact that the realty which she acquired prior to the marriage and owned separately was relied upon by the lender in issuing the purchase money mortgage on the realty acquired by her and decedent as tenants in common, establishes she contributed "in money's worth" to that commonly owned property. She concludes, therefore, that one-half its value should be excluded from the augmented estate computation. Although the District Court agreed with appellee, we do not. The fact that a separately owned asset was relied upon to acquire another asset during marriage does not, in and of itself, change the nature of the contribution by a spouse to the acquisition of a shared asset.

Yet remaining for determination is whether appellee satisfactorily proved her statutorily required need for a supplemental family allowance. The personal representative of the estate initially determined an allowance to appellee in the amount of $6,000, payable in monthly installments of $500. Nine or ten of the twelve payments were made, totaling $4,500 or $5,000 (the record is not clear), and then discontinued because of a lack of cash in the estate. Subsequently, the personal representative filed a petition requesting permission to continue to pay $500 per month during the remaining administration period of the estate; however, the county court granted a maximum of $175 per month. The District Court found that appellee had failed to adequately demonstrate her statutorily required need for a continuation of the family allowance beyond the initial 12-month period. The District Court denied the request for the additional allowance but ruled that the full $6,000 be paid when the assets of the estate so permit. The District Court was correct.

Neb. Rev. Stat. §§ 30-2324 and 30-2325 (Reissue 1979), applicable at the time of the proceedings at issue, provided for an allowance to appellee in the to-

tal amount of $6,000, permissibly payable in periodic installments not exceeding $500 per month for 1 year. This was a specific, vested, and indefeasible statutory right accruing to appellee upon decedent's death. See § 30-2325. Therefore, the remaining balance of the original $6,000 properly determined shall be paid to appellee. We also agree with the District Court that appellee failed to establish the requisite need for any continued allowance beyond the $6,000.

We remand to the Twelfth Judicial District Court, Buffalo County, for judgment consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., concurs in the result.

ELEANOR F. LEACH, APPELLANT, V. STATE DEPARTMENT OF MOTOR VEHICLES ET AL., APPELLEES.

327 N.W.2d 615

Filed December 17, 1982. No. 44484.

1. **Administrative Agencies: Parties: Appeal and Error.** Where an administrative agency is charged with the responsibility of protecting the public interest as distinguished from determining the rights of two or more individuals in a dispute before such agency, it is a necessary party in any appellate proceeding.
2. **Statutes.** When a statute adopts the general law on a particular subject rather than a specific statute, it adopts not only the existing law but later legislation on the subject as well.
3. **Administrative Agencies: Appeal and Error.** An "appeal" from an order of the director of the Department of Motor Vehicles under Neb. Rev. Stat. § 60-420 (Reissue 1978) or § 84-917(2) (Reissue 1981) is commenced or perfected by filing a petition within 30 days of the service of the final decision of the director and causing a summons to issue on the petition and be served within 6 months of such filing.
4. **Administrative Agencies: Parties: Appeal and Error.** Making an administrative agency a party defendant in an appeal under the provisions of Neb. Rev. Stat. § 60-420 (Reissue 1978) or § 84-917(2) (Reissue 1981) is not an action against the State of Nebraska within the meaning of Neb. Rev. Stat. §§ 24-319 et seq. (Reissue 1979) so as to require service of summons upon the Governor and the Attorney General.

Appeal from the District Court for Cheyenne County: JOHN D. KNAPP, Judge. Reversed and remanded.

David T. Schroeder, for appellant.

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter, for appellees.

KRIVOSHA, C.J., HASTINGS, and CAPORALE, JJ., and DAVIS, D.J., and COLWELL, D.J., Retired.

HASTINGS, J.

The driver's license of the plaintiff, Eleanor F. Leach, was revoked for a period of 6 months under the provisions of the Nebraska implied consent law, Neb. Rev. Stat. § 39-669.16 (Reissue 1978), by an order of Harry "Pete" Peterson, Director, Department of Motor Vehicles, State of Nebraska. The plaintiff appealed to the District Court of Cheyenne County. That court sustained a special appearance filed by all defendants because of lack of jurisdiction over them. The plaintiff has appealed to this court.

The director's order was entered on June 26, 1980, and the petition on appeal was filed in the District Court on July 9, 1980. However, the praecipe for summons was not filed until October 23, 1980, upon which summons was issued the same date and served on Harry "Pete" Peterson, Director, Department of Motor Vehicles of the State of Nebraska, on October 28, 1980.

In the meantime, on September 5, 1980, the State of Nebraska, the Department of Motor Vehicles, and Harry "Pete" Peterson, Director, Department of Motor Vehicles of the State of Nebraska, had filed a special appearance which was sustained on October 29, 1980. The cause had been submitted on briefs on October 22, the day before the plaintiff finally filed her praecipe for summons.

The plaintiff assigns as error simply that the court

erred in sustaining the special appearance and dismissing her appeal.

We should note at the outset that no summons was ever requested or issued for service upon the State of Nebraska or the Department of Motor Vehicles, and therefore the special appearance was properly sustained as to those parties. As to the defendant Peterson, the summons served upon him was not returned to the court until November 3, 1980, and therefore the order sustaining the special appearance as to him was proper as of the date of its issuance, October 29, 1980. However, by the time the motion for a new trial had been filed and overruled, the record disclosed that the summons had in fact been served on October 28, 1980.

Neb. Rev. Stat. § 60-420 (Reissue 1978) authorizes an appeal from an order of the director and provides specifically as follows: "Applicant or licensee shall file his petition in such district court within thirty days from the date of filing of the director's final order in the matter, and he shall file such transcript before answer day which shall be the same as provided under the code of civil procedure in section 25-821."

In order to determine the proper procedure to perfect an appeal in a case such as this, the foregoing section must be read together with Neb. Rev. Stat. § 84-917(2) (Reissue 1981), which provides: "Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. Summons shall be *served as in other actions* except that a copy of the petition shall be served upon any such agency together with the summons. . . ." (Emphasis supplied.)

Although § 60-420 speaks in terms of an "appeal," it is apparent from a reading of § 84-917(2) and a consideration of the actual nature of the proceedings

that this is not an appeal, but rather is a proceeding to review the action of an administrative agency. Thus, particularly in cases of this kind, where the agency, or rather the director, is charged with the responsibility of protecting the public interest as distinguished from determining the rights of two or more individuals in a dispute before such agency, Peterson, as such director, was one of "all parties of record." He therefore is a necessary or indispensable party in this "appellate" proceeding. *Winkelmann v. Nebraska Liquor Control Commission,* 198 Neb. 481, 253 N.W.2d 307 (1977).

The defendants insist that *Norris P.P. Dist. v. State ex rel. Jones,* 183 Neb. 489, 161 N.W.2d 869 (1968), requires that in order to perfect an appeal in this type of proceeding, not only must the petition be filed within the 30-day period but so must the summons be issued and served within that same time frame. That was clearly the holding of *Jones,* which stated that the filing of a petition without the issuance of a summons did not amount to the commencement of an action, and cited Neb. Rev. Stat. § 25-217 (Reissue 1964) in support of that statement. However, at the time of the opinion, that particular section read: "An action shall be deemed commenced, within the meaning of this chapter, as to the defendant, *at the date of the summons* which is served upon him . . . ." (Emphasis supplied.) Section 25-217 (Reissue 1979), which was effective at the time the instant case was decided by the trial court, reads as follows: "An action shall be deemed commenced, within the meaning of this chapter, as to the defendant, *on the date the petition is filed* with the court if proper service is obtained within six months of such filing." (Emphasis supplied.)

It is the defendants' further contention, however, that where the provisions of a statute are incorporated by reference into another or where one statute refers to another for powers given or rules of procedure prescribed by the former, the statute or

provision referred to becomes a part of the referring statute; and in the event the earlier statute is later repealed the provisions incorporated, the powers given, or rules prescribed by the incorporated statute continue in force. They cite *Hanson v. City of Omaha,* 157 Neb. 768, 61 N.W.2d 556 (1953), in support of such a rule. More recently, the same rule was again stated in *School Dist. No. 17 and Westside Comm. Schools v. State,* 210 Neb. 762, 316 N.W.2d 767 (1982). However, the same situation as found in *Hanson* and *School Dist. No. 17* is not present in the instant case. In the first place, no specific statute has been incorporated into § 84-917(2). At most, it amounts to the adoption of the general law as to service of summons "as in other actions," part of which is composed of § 25-217. We believe that when a statute adopts the general law on a particular subject rather than a specific statute, it adopts not only the existing law but later legislation on the subject. *State v. District Court (Delaware County),* 253 Iowa 903, 114 N.W.2d 317 (1962). Furthermore, the statute under discussion was not repealed but was amended, contrary to the situation in *Hanson* and *School Dist. No. 17.* The specific holding in *Jones,* that a "plaintiff on appeal" must not only file a petition within the 30-day period but must also cause a summons to be issued within the same time frame, is no longer applicable.

Whether we look to § 60-420 (the applicant "shall file his petition . . . within thirty days") or § 84-917(2) ("proceedings . . . shall be instituted by filing a petition . . . within thirty days"), the plaintiff, by filing a petition within 30 days and causing summons to issue and be served within 6 months thereof, has perfected her "appeal" within the statutory time limits.

The defendants also argue that in order to make the State of Nebraska a party defendant, summons must issue in the manner provided for in Neb. Rev. Stat. § 24-321 (Reissue 1979), which requires service upon the Governor, the Attorney General, and the

chief officer of the department involved. However, that section is applicable only to actions brought under Neb. Rev. Stat. § 24-319 (Reissue 1979), which include claims rejected or disallowed by the Director of Administrative Services, claims for relief that may be presented to the Legislature, setoffs and claims for damages, cases where the State of Nebraska shall have a lien, and all cases where the State of Nebraska or the Board of Educational Lands and Funds of the State of Nebraska is the owner of or has or claims an interest in certain municipal bonds. The present proceeding does not fit within any of those requirements. Making an administrative agency a party defendant in an appeal under the so-called "Administrative Procedures Act," Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981), is not an action against the State of Nebraska within the meaning of §§ 24-319 et seq.

The District Court was in error in sustaining the special appearance of the defendant Peterson and in dismissing the plaintiff's appeal. Accordingly, its judgment is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

DAIRYLAND INSURANCE COMPANY, RICHARD A. WRICH, AND JUDITH C. POPISH, APPELLANTS, V. DIANA K. KAMMERER, MATTHEW B. KAMMERER, AUTO-OWNERS INSURANCE COMPANY, AND ALLSTATE INSURANCE COMPANY, APPELLEES.

327 N.W.2d 618

Filed December 17, 1982. No. 44505.

Insurance: Breach of Contract: Waiver. An insurer is precluded from asserting a forfeiture where, after acquiring knowledge of the facts constituting a breach of condition, it has retained the unearned portion of the premium or has failed to return or tender it back with reasonable promptness, especially where the nature of

the breach or ground for forfeiture is of such character as to render the policy void from its inception.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded with directions.

John J. Respeliers of Respeliers and DiMari, for appellants.

Eugene P. Welch of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee Auto-Owners.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

KRIVOSHA, C.J.

The instant appeal grows out of a suit instituted principally by the appellant Dairyland Insurance Company seeking to have the trial court find that a certain insurance policy, issued by the appellee Auto-Owners Insurance Company, provided primary coverage for an accident which occurred on March 27, 1980. The trial court found that because the principal insured, Judith C. Popish, had fraudulently failed to disclose to Auto-Owners the fact that Richard A. Wrich was a member of her household at the time the insurance was issued, the policy of insurance issued by Auto-Owners provided no coverage to Wrich as driver of Popish's car when involved in the accident of March 27, 1980. For reasons more particularly set out in the opinion, we believe that the trial court was in error and therefore reverse and remand the decision with directions.

The record discloses that on March 5, 1980, Auto-Owners, through one of its authorized agents, issued a binder to Popish covering a certain 1974 MGB convertible owned by Popish. On March 27, 1980, Wrich, with permission of Popish, was operating her insured automobile and was involved in an accident with another automobile, allegedly injuring Diana K. Kammerer. On April 10, 1980, Auto-Owners sent to Popish a notice of cancellation, advising her that

the company would cancel the policy effective 12:01 a.m. on April 22, 1980. This, of course, was almost a month after the accident occurred. The reason given in the notice of cancellation was "UNDERWRITING REASONS." Consistent with the company's position concerning the date upon which the cancellation was to be effective, the company returned only a portion of the total premium paid by Popish to Auto-Owners, which was equal to the premium collected for the period after the date of cancellation. The record is devoid of any evidence that Auto-Owners has returned to Popish anything more than the initial refund.

In its answer to the petition filed by Dairyland, Auto-Owners maintained that the policy was void ab initio because Popish had failed to disclose to the company the fact that Wrich resided in the home owned by Popish and was therefore a "member of her household." The trial court agreed with Auto-Owners and found specifically that Popish's failure to advise Auto-Owners that Wrich was a member of her household was a material misrepresentation which entitled Auto-Owners to avoid coverage of Wrich under the policy. Because of the action taken by Auto-Owners in attempting to cancel the policy, we need not reach the question of Popish's alleged fraud.

Under the terms of the policy issued by Auto-Owners, when, on March 27, 1980, Wrich operated Popish's motor vehicle with her permission, he was an "insured." The policy specifically defined the insured to be "the named insured and any person using the automobile . . . with the permission of the named insured . . . ." The policy clearly provided coverage for both Popish and Wrich, unless, on March 27, 1980, the policy was not at all in effect.

When learning of the alleged fraud, Auto-Owners had two choices. Either it could determine that, because of the alleged fraudulent statements made to it, it wished to cancel the policy from its inception

and return to Popish the entire premium, on the theory that the policy never came into existence, or it could waive the alleged fraud, keep the premium earned to date of cancellation, and accept responsibility under the policy. If Auto-Owners elected to rescind the policy from its inception, it must place Popish back in the same position Popish was in before the policy was issued, including returning to her all of the premium. But Auto-Owners chose not to do so. Both by its notice of cancellation and by its retention of a portion of the premium, Auto-Owners elected to recognize the existence of the policy from the date of its issuance on March 5, 1980, until the date of its declared cancellation on April 22, 1980. Having made that choice, Auto-Owners acknowledged that the policy was in effect on the date of the accident, March 27, 1980, and it therefore became liable under the policy. Auto-Owners could not, on the one hand, recognize the existence of the policy and retain a portion of the premium and, on the other hand, deny the coverage afforded by the policy because of alleged fraudulent misrepresentations.

In 45 C.J.S. *Insurance* § 716 at 696-97 (1946), the author notes: "Insurer is precluded from asserting a forfeiture where, after acquiring knowledge of the facts constituting a breach of condition, it has retained the unearned portion of the premium or has failed to return or tender it back with reasonable promptness, especially where the nature of the breach or ground for forfeiture is of such character as to render the policy void from its inception . . . ." See, also, *Hawkeye Casualty Co. v. Stoker,* 154 Neb. 466, 48 N.W.2d 623 (1951); *Farmers & Merchants Ins. Co. v. Bodge,* 76 Neb. 31, 106 N.W. 1004 (1906), *rev'd on other grounds* 76 Neb. 35, 110 N.W. 1018 (1907); 45 C.J.S. *Insurance* § 470 (1946); *St. Paul Fire & Marine Ins. Co. v. Ruddy,* 299 F. 189 (8th Cir. 1924).

Obviously, Auto-Owners had knowledge of the alleged "fraudulent misrepresentation" at least by the time it filed its answer in this case. And even

though it relied upon rescission in its answer, it nevertheless stood by its earlier cancellation and kept the portion of the premium earned during the time the accident occurred. Having waived its right to rescind the policy from its inception and having elected to keep the policy in force until April 22, 1980, Auto-Owners became liable to defend Popish and Wrich and to pay any judgments which may be assessed against Popish and Wrich as covered by the policy.

Appellants jointly have requested the allowance of an attorney fee both in this court and in the trial court, pursuant to the provisions of Neb. Rev. Stat. § 44-359 (Reissue 1978). That section provides in part: "In all cases where the beneficiary, or other person entitled thereto, brings an action upon any type of insurance policy . . . the court, upon rendering judgment against such company, person or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings . . . ." Because the plaintiffs in the court below and the appellants in this court include both the beneficiaries of the policy (i.e., Popish and Wrich) and Wrich's carrier, we are unable at this time to determine whether the provisions of § 44-359 should be applied. The appellants Popish and Wrich clearly are "beneficiaries" who have brought "an action upon" the liability insurance policy. Attorney fees under the statute are available for an insured who wins a declaratory judgment action against the insurer. *Herrera v. American Standard Ins. Co.,* 203 Neb. 477, 279 N.W.2d 140 (1979). However, the appellant Dairyland Insurance Company stands on different ground. Dairyland may be entitled to bring or join this declaratory judgment action because of the effect a judgment may have on its own liability to Wrich on

a separate policy. But, as between Dairyland and Auto-Owners, this suit is merely an adjustment of liability priorities and cannot be seen as "an action upon" the policy issued by Auto-Owners to Popish. The appellants Richard A. Wrich and Judith C. Popish are therefore given 10 days from the date of the issuance of this opinion in which to make a showing to this court of whether they have incurred any expenses by way of attorney fees in connection with either the trial of this case in the District Court or its appeal in this court. See *Hawkeye Casualty Co. v. Stoker, supra.* The appellees are given 5 days thereafter to make any countershowing. Upon the filing of such showings, the court will give further consideration to the request for attorney fees. Except, therefore, for the matter of attorney fees, which the court reserves at this time, the judgment of the trial court is reversed and the cause remanded with instructions to enter a judgment for the appellants as prayed for in their petition.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., concurs in the result.

ELLA BETH STOLTE, APPELLANT, V. HERBERT A. BLACKSTONE, APPELLEE.

328 N.W.2d 462

Filed December 17, 1982. No. 81-633.

1. **Summary Judgment.** The absence of a genuine issue as to any material fact and entitlement to judgment as a matter of law are prerequisites to a summary judgment.
2. _____. The purpose of a motion for summary judgment is to pierce the allegations of the pleadings and to show conclusively that the controlling facts are otherwise than as alleged.
3. _____. Summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear.
4. **Witnesses: Perjury.** Witnesses generally are immune from civil liability for damages resulting from testimonial statements, and

no civil action lies to recover damages caused by perjury or for conspiracy to commit perjury unless the perjury is but a part of a larger plan or scheme.

Appeal from the District Court for Morrill County: ROBERT O. HIPPE, Judge. Affirmed.

Wright, Simmons & Selzer, and P. J. Heaton, Jr., for appellant.

Richard M. Van Steenberg of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, and Thomas J. Shomaker of Sodoro, Daly & Sodoro, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, HASTINGS, and CAPORALE, JJ.

CAPORALE, J.

This appeal challenges the summary judgment granted by the trial court to defendant-appellee, Dr. Herbert A. Blackstone, which dismissed the petition of plaintiff-appellant, Ella Beth Stolte. Stolte's petition sought money damages for Blackstone's alleged fraud and conspiracy to defraud Stolte and others in a will contest case. Among other assignments, Stolte contends the trial court erred in ruling that no civil action for damages lies for giving or conspiring to give false testimony. We affirm the judgment of the trial court.

Clair V. Gilbert felt deeply the September 1969 death of his wife. In July 1970 he was committed to a state hospital, but was discharged approximately 1 month later. Dr. Blackstone was Mr. Gilbert's attending physician at that time, had participated in the commitment, and had treated him after the release.

Following the death of his wife, Mr. Gilbert, having no children, became reliant upon one of his nieces, Millie Gilbert. The record further indicates that from March 1970 to May 1973 Mr. Gilbert made gifts to Millie Gilbert of money to the extent of about one-quarter of a million dollars. On May 7, 1971, he executed a will leaving his remaining estate of a

little over one-half of a million dollars to Millie Gilbert. Mr. Gilbert died on January 31, 1975.

An action was brought to contest Millie Gilbert's claim to Clair V. Gilbert's estate, as well as the validity of the inter vivos gifts to her. The action sought to invalidate the will and to recover the gifts made, claiming Millie Gilbert unduly influenced the decedent and that he was mentally incompetent. The suit was settled in July 1977, immediately preceding trial. The parties in settlement compromised the amount of moneys they would respectively take.

Dr. Blackstone testified on March 12, 1977, in a deposition given in conjunction with that suit, that Clair V. Gilbert was competent, in his professional opinion, to have made both the gifts and the will. However, on May 16, 1978, the heirs herein discovered, during a consultation with the Internal Revenue Service in regard to other matters, a handwritten memorandum from Dr. Blackstone to the effect that Mr. Gilbert was incompetent. This memorandum was dated May 18, 1972. In addition to describing Clair V. Gilbert's condition in technical medical terms, it certified that he was not then in possession of his mental faculties and had not been for some time, and, further, that he had not managed his own affairs for the preceding 12- to 18-month period.

The pivotal issue is whether the trial court was correct in ruling that the March 12, 1977, testimony of Dr. Blackstone, if indeed it was false, would necessarily be immune from civil liability. If such immunity does exist, then there could be no genuine issue as to any material fact and Dr. Blackstone was entitled to judgment as a matter of law. The absence of a genuine issue as to any material fact and entitlement to judgment as a matter of law are prerequisites to a summary judgment. Neb. Rev. Stat. § 25-1332 (Reissue 1979); *Gitschel v. Sauer,* 212 Neb.

454, 323 N.W.2d 93 (1982); *Manzer v. Pentico,* 209 Neb. 364, 307 N.W.2d 812 (1981).

It appears that we have not heretofore addressed the question of whether the immunity generally granted witnesses should extend to giving or conspiring to give false testimony. However, a variety of reasons have been stated by other courts in support of the majority rule which refuses to recognize a common-law civil cause of action for giving false testimony. Among the principal reasons are that witnesses need to be protected against the fear of subsequent actions based on their testimony; that a final judgment or other final disposition cannot be collaterally attacked; and that to permit the issues to which the allegedly false testimony was addressed to be retried would lead to endless litigation. The general rule is stated to extend to conspiracy actions on the ground that an act which is not itself actionable cannot be the object of an actionable conspiracy. An exception is frequently recognized when the total objective of the conspiracy is greater than the determined issue and the determined issue is but a step or part of the larger total conspiracy or fraudulent scheme. See, Annot., 31 A.L.R.3d 1423 (1970); Annot., 54 A.L.R.2d 1298 (1957).

Plaintiff alleges a conspiracy. Among the items of evidence is the affidavit of Dr. Blackstone in which he categorically denies any scheme or conspiracy with Millie Gilbert or anyone else to assist her or them in gaining an advantage over plaintiff-appellant or others. This statement stands uncontradicted. Although the purpose of a motion for summary judgment is to pierce the allegations of the pleadings and to show conclusively that the controlling facts are otherwise than as alleged, *Gerdes v. Spetman,* 197 Neb. 406, 249 N.W.2d 210 (1977), and *Prairie View Tel. Co. v. County of Cherry,* 179 Neb. 382, 138 N.W.2d 468 (1965), summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn

from those facts are not clear. *Metro. Tech. Community College v. South Omaha Industrial Park,* 207 Neb. 472, 299 N.W.2d 535 (1980). For the purpose of this opinion we assume arguendo that an inference of a conspiracy can be drawn from the circumstances, notwithstanding Dr. Blackstone's denial of such.

15A C.J.S. *Conspiracy* § 16 at 648 (1967) speaks to the issue as follows: "Since, as a general rule, in the absence of statute, no action lies to recover damages caused by perjury, false swearing, subornation of perjury, or an attempt to suborn, as discussed in Perjury § 92, an action for damages for conspiracy to commit perjury and the giving of false testimony or for subornation or attempted subornation of perjury, cannot ordinarily be maintained. It has been held, however, that where the giving of false testimony is but a part of a plan or scheme to defraud a person, an action for the conspiracy will lie. . . ." The same view is taken in 16 Am. Jur. 2d *Conspiracy* § 63 at 275-76 (1979): "The general rule is that no civil action for damages lies for false testimony, or for subornation of false testimony, or for conspiracy to give or to procure false testimony. Several reasons have been stated by the courts for refusing to recognize a cause of action for conspiracy to give false testimony: testimony of witnesses is privileged to protect them against the fear of subsequent actions based on their testimony; an act which is not in itself actionable cannot be the subject of an actionable conspiracy; and the final judgment in the action in which the false testimony has been given cannot be collaterally attacked.

"An action for conspiracy to procure false testimony can be brought where all the parties to the conspiracy action were strangers to the action or proceeding in which the testimony was used. Also, some cases hold or recognize that an action may be brought where the alleged perjury is merely a step

in the accomplishment of a larger, actionable conspiracy."

Eikelberger v. Tolotti, 96 Nev. 525, 611 P.2d 1086 (1980), held that plaintiffs had no cause of action for civil conspiracy against an attorney who submitted a partially false affidavit, on the basis that perjury is an offense against the public only and is subject only to the criminal law.

In *W. G. Platts, Inc. v. Platts,* 73 Wash. 2d 434, 438 P.2d 867 (1968), plaintiff claimed that defendants testified differently in depositions than they had indicated they would in a criminal action and a civil action growing out of it wherein both actions were defeated. Defendants were then sued for the damages plaintiff claimed he suffered. In affirming the trial court's granting of the summary judgment, the Washington Supreme Court said at 440, 438 P.2d at 871: "Perjury is, of course, a public offense and punishable in criminal proceedings, but from earliest times the giving of false testimony has not been treated as a wrong actionable in civil proceedings. This same immunity applies to statements made preliminary to testifying."

In *Ragsdale v. Watson,* 201 F. Supp. 495 (W.D. Ark. 1962), plaintiff alleged that he had sustained an injury while acting within the scope of his employment but was defeated in his efforts to obtain workmen's compensation benefits by a conspiracy between the insurance adjuster and two physicians to defraud him. Plaintiff claimed the adjuster had him examined by the physicians and subsequently secured from them false, incomplete and misleading reports and evidence as to his physical condition which resulted in denial of his claim. The motion of the several defendants to dismiss for failure to state a claim was sustained and the complaint dismissed. In doing so the court stated at 502: "Since the civil conspiracy to defraud alleged in this action is based on the overt act of perjured testimony, the next question is whether the perjured testimony itself on

the part of an individual is subject to a civil suit. The rule as to civil liability for perjury is stated as follows in 41 Am.Jur., Perjury, beginning at page 44:

" 'Sec. 81. Generally.—Ordinarily, aside from defamation and malicious prosecution, the courts will not recognize any injury from false testimony upon which a civil action for damages can be maintained. Thus, it has been held that false testimony in a criminal action which results in a conviction of the plaintiff does not furnish the basis of a civil suit to recover damages, and that no action for damages lies for false testimony in a civil suit whereby the plaintiff fails to recover a judgment, or a judgment is rendered against him. * * * In accordance with these principles, therefore, no action lies for false testimony by reason of which the plaintiff recovers a smaller amount of damages than the amount to which he is entitled.' "

Williams v. McClellan, 59 Misc. 620, 111 N.Y.S. 229 (1908), is somewhat similar to the present case. Plaintiff therein claimed that, in reliance upon certain statements made to him by the defendants, and upon their agreements to testify to certain facts, he had brought an action to establish a will and to set aside certain allegedly fraudulent deeds. He further claimed that, pursuant to a conspiracy between the defendants, they had withheld that testimony and had falsely testified to the contrary, as a result of which judgment was entered against plaintiff. A demurrer to the complaint was sustained, the court observing that an action will not lie to recover damages for perjury alleged to have been committed in a former case in which the plaintiff might have been interested. However, *Newin Corp. v. Hartford Acc.,* 37 N.Y.2d 211, 333 N.E.2d 163, 371 N.Y.S.2d 884 (1975), held a cause existed against insurers to recover on bonds issued to persons not involved in the suit on another bond wherein the perjury occurred. *Newin* rested on the rationale that the conspiracy in-

volved a fraudulent scheme beyond the issues involved in the proceeding at which the perjury took place.

Although the Wisconsin Supreme Court in *Radue v. Dill,* 74 Wis. 2d 239, 246 N.W.2d 507 (1976), held that the allegation that defendants conspired to injure plaintiff's reputation and professional standing by giving false information stated a cause of action under its statute prohibiting conspiracies to injure another's reputation or profession by any means, the allegation did not state a cause of action based on perjury. In so concluding, the court reviewed the authorities as follows at 241-43, 246 N.W.2d at 509-10: "The defendants' contention in support of the demurrer is simply that a conspiracy to give or to procure the giving of false testimony is not civilly actionable. The basis for this argument is the long established rule that statements made during investigatory proceedings and judicial proceedings are absolutely privileged, and therefore acts of perjury may not form the basis of a civil action for damages. *Bergman v. Hupy* (1974), 64 Wis.2d 747, 221 N.W.2d 898; *Schultz v. Strauss* (1906), 127 Wis. 325, 106 N.W. 1066. Such statements are privileged to promote the policy of encouraging witnesses to speak freely without fear of civil liability, and as a result perjury is an offense against the public only and subject only to the criminal law. The defendants argue that since overt acts pursuant to the conspiracy are necessary, there can be no civil action where, as in this case, the only overt acts are privileged acts of perjury. They apparently reason that an act which constitutes no ground of an action when done by one alone cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several.

"Although this court has never considered the question, the courts of other jurisdictions have uniformly held that a plaintiff may not, by claiming conspiracy, avoid the doctrine that there is no civil

action for perjury. *Platts v. Platts,* (1968), 73 Wash.2d 434, 438 P.2d 867; Annot., *Actionability of Conspiracy to Give or to Procure False Testimony or Other Evidence,* 31 A.L.R.3d 1423 (1970). These decisions reveal two basic grounds upon which the courts have relied to void this type of action. The first ground is, of course, that privileged acts of perjury may not form the basis of any civil action. The second ground relied upon is that there may be no action for civil conspiracy unless the overt acts causing damage are actionable themselves. *See Platts v. Platts, supra,* at p. 439.

"The plaintiff, however, bases his claim for relief upon two arguments, which, he contends, distinguish this case from those of other jurisdictions. First, plaintiff claims that an exception to the general rule against civil actions for conspiracy to commit perjury exists and applies here where the perjury is merely a step in the accomplishment of a larger plan. Second, plaintiff claims that sec. 134.01, Stats., creates a civil cause of action for conspiracy alone.

"An action for conspiracy will lie where the perjury is merely a step in the accomplishment of a larger plan. *Verplanck v. Van Buren* (1879), 76 N.Y. 247. The instant case, however, does not fall within this rule. According to the complaint, the only acts complained of are privileged acts of giving false information, and while the plaintiff contends that these acts are only a part of the entire transaction, there is nothing alleged to show any other parts. These acts of perjury appear to be the entire plan. In each of the cases to which plaintiff points in support of his contention, there were either other acts in furtherance of the conspiracy besides the acts of perjury, or the action involved was one based not solely upon conspiracy but upon fraud and deceit. For example, in *Verplanck v. Van Buren, supra,* the defendants had not only perjured themselves but, as the court pointed out, more importantly had pre-

pared fictious [sic] contracts and made false entries into the books of account. In *Frist v. Gallant* (W.D.S.C. 1965), 240 F. Supp. 827, the court held that the plaintiff's action charging the defendants with conspiracy to defraud could be based upon perjured testimony, provided all the necessary elements of fraud and deceit were proved. In the case now before this court the claim is one based solely upon an executed conspiracy, the only overt acts of which are the giving of false testimony."

Application of the general rule is not, however, universal. For example, *Morgan v. Graham,* 228 F.2d 625 (10th Cir. 1956), held that the general rule did not apply to the false and fraudulent acts of an insurer and its tort-feasor in making false statements that the tort-feasor was not covered by insurance.

Nonetheless, since it is the damage resulting from the perjury which a civil action seeks to redress, we are of the opinion the better reasoning requires that the perjury be but a step or part of a larger total conspiracy or fraudulent scheme in order to create an exception to the rule that there is no civil liability for giving or conspiring to give false testimony. Here, the only complaint made is of the alleged false testimony; the consequence sought to be redressed flows solely and only from the defendant's deposition testimony.

In the absence of a statute imposing civil liability, we believe the better policy to be to grant witnesses immunity from civil liability for damages resulting from statements made by them as such, and to leave the matter of liability for perjury to the criminal law. See Neb. Rev. Stat. § 28-915 (Reissue 1979). In view of this determination, consideration of appellant's other arguments of error is not necessary.

AFFIRMED.

WHITE, J., participating on briefs.

Cite as 213 Neb. 123

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. PAUL G. MATT III, RESPONDENT.

327 N.W.2d 622

Filed December 17, 1982. No. 81-690.

1. **Disciplinary Proceedings.** It is the obligation of this court in disciplinary proceedings to review the evidence de novo to determine if discipline should be imposed and, if it should, the extent thereof.
2. **Disciplinary Proceedings: Aiding and Abetting.** Aiding and abetting criminal dealings in controlled substances, whatever the motivation of an attorney may be, constitutes conduct involving moral turpitude and warrants disciplinary action.

Original action. Judgment of suspension.

Paul L. Douglas, Attorney General, and Mel Kammerlohr, for relator.

Barlow, Johnson, DeMars & Flodman, for respondent.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

This is an original proceeding in which the Nebraska State Bar Association, relator, filed formal charges against Paul G. Matt III, respondent, who was admitted to the practice of law in this state on February 23, 1971.

Formal charges against the respondent Matt were filed in this court on September 28, 1981, by the Committee on Inquiry of the First Judicial District. The formal charges allege that on or about March 7, 1980, the respondent received a telephone call at his law office from a personal friend, Judy Gierlich. Gierlich asked the respondent where she could obtain cocaine. The respondent first told her that he did not know, but on further questioning agreed to contact a friend of his in Omaha, Nebraska, concerning the availability of cocaine and then recontact her.

On or about March 8, 1980, respondent called

Gierlich at approximately 10:15 a.m. and told her that he had talked to the friend in Omaha and had been told that anything was available. At approximately 10:23 a.m. on the same day respondent received a telephone call from Gierlich. Respondent asked Gierlich what quantity of cocaine she intended to purchase. Respondent then gave the telephone number of the person in Omaha to Gierlich and advised her that he would also call again "to make sure there's no problem."

Later on March 8, 1980, Gierlich called the person in Omaha and agreed to meet him at his residence in Omaha at 1 p.m. for the purchase of cocaine. At approximately the appointed time Gierlich arrived at the residence in Omaha. When she left the residence some 2 hours later she was arrested by officers of the Nebraska State Patrol. She was subsequently searched and found to be in possession of 2 ounces of cocaine and $2,000 in cash.

The record establishes that Gierlich's telephone was being tapped by the Lincoln Police Department in connection with a drug investigation at the time of the conversations between Gierlich and respondent. The record also establishes that, based on respondent's telephone conversations with Gierlich, the respondent was charged with conspiracy to possess cocaine with intent to deliver. Those charges were pending for more than a year before the respondent was allowed to enter the pretrial diversion program. Upon his successful completion of the program, the charges against respondent were dismissed.

A hearing was held before the Committee on Inquiry of the First Judicial District on July 17, 1981. Exhibits were received and the respondent testified fully and freely. The record reflects that prior to the events in March 1980 the respondent had occasionally used marijuana personally and had purchased marijuana more than once from Gierlich, who was a close personal friend. His conduct here was motivated by his friendship with Gierlich and

he received no remuneration for his efforts.

Following the hearing the Committee on Inquiry prepared formal charges against the respondent, alleging that these facts constituted a violation of the Code of Professional Responsibility and of Disciplinary Rule 1-102(A)(1) and (6). Those rules provide: "A. A lawyer shall not:

"1. Violate a Disciplinary Rule. . . . 6. Engage in any other conduct that adversely reflects on his fitness to practice law."

The charges of the Committee on Inquiry were reviewed by the Disciplinary Review Board, which found that grounds existed for discipline of the respondent and directed that formal charges and the record be filed with this court. The Disciplinary Review Board recommended that the court issue a reprimand. Formal charges were filed in this court on September 28, 1981.

By agreement of counsel a conditional admission was filed, together with a recommendation that this court impose a judgment of censure and reprimand on the respondent. The recommendation was not accepted by this court and the matter was referred to a referee. The referee considered the matter solely upon the record at the hearing before the Committee on Inquiry. On April 15, 1982, the referee filed his report finding that the respondent had violated Disciplinary Rule 1-102(A)(1) and (6) of the Code of Professional Responsibility and recommended that respondent be suspended from the practice of law for a period of 1 year, and that readmission be denied unless respondent made a satisfactory showing of rehabilitation from usage of controlled substances.

It is the obligation of this court in disciplinary proceedings to review the evidence de novo to determine if discipline should be imposed and, if it should, the extent thereof. *State ex rel. Nebraska State Bar Assn. v. McArthur,* 212 Neb. 815, 326 N.W.2d 173 (1982).

The referee specifically found that as a result of respondent's efforts Judy Gierlich was able to illegally purchase a controlled substance and respondent's personal acquaintance in Omaha was able to sell a controlled substance, and respondent knew, or had reason to know, that such would be the result of his efforts.

This court finds that such conduct adversely reflects upon respondent's fitness to practice law and constitutes a violation of the disciplinary rules as charged. There can be no doubt that aiding and abetting criminal dealings in controlled substances, whatever the motivation of an attorney may be, constitutes conduct involving moral turpitude and warrants disciplinary action.

The record reflects that the respondent has successfully completed pretrial diversion and no longer is involved with drugs. There are other mitigating circumstances shown in the record which should be considered in determining what discipline should be imposed.

We conclude that the respondent should be suspended from the practice of law for a period of 1 year. All costs are taxed to the respondent.

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA, APPELLEE, V. RICHARD SCHMIDT, SR., APPELLANT.

327 N.W.2d 624

Filed December 17, 1982. No. 82-147.

1. **Criminal Law: Judgments: Appeal and Error.** In reviewing criminal cases this court will not set aside the judgment of the trial court if there is sufficient evidence, taking the view most favorable to the State, to support the judgment.
2. **Plea in Abatement.** Any error by the District Court in ruling on a plea in abatement is cured by a subsequent finding by the "trier of fact" of guilt beyond a reasonable doubt.
3. **Sentences: Appeal and Error.** A sentence imposed within statu-

tory limits will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

David A. Bush, for appellant.

Paul L. Douglas, Attorney General, and Lynne Rae Fritz, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

KRIVOSHA, C.J.

On June 15, 1981, the appellant, Richard Schmidt, Sr. (Schmidt), was charged in an amended complaint with the crimes of attempted murder in violation of Neb. Rev. Stat. § 28-201 (Reissue 1979) and kidnapping in violation of Neb. Rev. Stat. § 28-313(1) (Reissue 1979). Following a preliminary hearing, Schmidt was bound over to the District Court for trial on both charges. He waived his right to a jury trial, and trial to the court commenced on January 11, 1982. At the conclusion of the trial he was found guilty of both offenses. Following the overruling of his motion for new trial, appellant was sentenced to concurrent terms of 7 to 15 years on the charge of attempted murder and 2 to 5 years on the charge of kidnapping, and he appealed to this court. Having reviewed the record in this case, we find that both the conviction entered by the trial court and the sentence imposed are in all respects correct, and affirm both the conviction and sentence.

Schmidt has assigned a number of errors. His first assignment of error is, in essence, that the evidence was insufficient to find him guilty beyond a reasonable doubt of the offenses charged. The record simply will not support that claim. There was more than sufficient evidence presented to the trial court from which the trial court could find beyond a reasonable doubt that on June 10, 1981, Schmidt, then being separated from his wife, Charlette

Schmidt, the victim in this case, contacted his wife and asked her to meet him at his partment so that they could go to pick up a gift that Schmidt told her she would enjoy. Schmidt directed his wife to come alone and to bring her own car. After arriving at Schmidt's apartment, Schmidt offered to drive, and his wife accepted. Schmidt drove to a gas station where he purchased gas, and then he drove his wife to a secluded country road in Hall County. Schmidt stopped the car on the shoulder of the road and informed his wife that he was leaving, taking only his clothes. He then handed her a letter and asked her to recopy it for him because, he maintained, the letter expressed her feelings about him and he wanted to keep this letter to remember her wherever he went. However, the letter actually referred to his wife leaving, instead of Schmidt. She refused to write the letter and asked Schmidt to take her home. Schmidt insisted that she rewrite the letter, and she finally acquiesced and rewrote the letter with a pen and stationery provided by Schmidt. Schmidt then gave her an envelope and instructed her to address it to his apartment and to place in it the rewritten letter. After she sealed the envelope, Schmidt took it from her.

Schmidt then asked his wife to go for a walk with him in the secluded area. She refused, and again requested that she be taken home. Schmidt got out of the car, walked around to the passenger side where his wife was seated, opened the door, and dragged his wife from the car. He continued to drag her through a vacant field a distance of about 100 to 150 yards into a grove of trees. Schmidt then forced his wife through some branches into a secluded clearing surrounded by trees and brush and attempted to place around her neck a piece of nylon rope with a loop tied into it. His wife struggled to get free, but could not. During the course of the struggle, however, the rope slipped down around her neck, causing the knot to come apart. She tried to

grab the rope to throw it away, but Schmidt retrieved it and tried to get it around her neck again. The attempt was unsuccessful and she struggled free. While on her knees, she pleaded with Schmidt to stop it, reminding him of a letter from a mutual friend and stating that the children did not deserve a broken home. She promised to come back to Schmidt and do anything he desired. At his request, she kissed him. She then asked Schmidt to take her home and they headed back for the car. Schmidt then returned his wife to her home and, believing her promise that they would reconcile, went home to change his clothes. Following an investigation of the incident, Schmidt was arrested by a sheriff's lieutenant 2 days later.

We have often stated that in reviewing criminal cases this court will not set aside the judgment of the trial court if there is sufficient evidence, taking the view most favorable to the State, to support the judgment. *State v. Parks,* 212 Neb. 635, 324 N.W.2d 673 (1982); *State v. King,* 204 Neb. 47, 281 N.W.2d 226 (1979). The question presented to us by these assignments of error is whether the evidence introduced at trial and viewed most favorably to the State establishes the elements of the crimes charged beyond a reasonable doubt. Section 28-313 as relevant to this case defines kidnapping as follows: "(1) A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to do the following: . . . (c) Terrorize him or a third person; or (d) Commit a felony . . . ." Section 28-201 as relevant to this case defines criminal attempt as follows: "(1) A person shall be guilty of an attempt to commit a crime if he: . . . (b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime. (2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to

commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result." We believe that the facts in this case more than adequately establish that Schmidt abducted his wife against her will and took her to the secluded area for the purpose of strangling her. It would be difficult to argue that the evidence did not prove that Schmidt abducted his wife and continued to restrain her for the purpose of either terrorizing her or committing a felony. One would further be hard pressed to argue that his dragging her through a field against her will and placing a rope around her neck in an attempt to strangle her did not establish a violation of both offenses charged. See *State v. Sodders,* 208 Neb. 504, 304 N.W.2d 62 (1981). We believe the evidence was sufficient, taking the view most favorable to the State, to find that the elements of both §§ 28-201 and 28-313(1) were established and the law violated. The assignment therefore is without merit.

A second error assigned by Schmidt is that he was denied a preliminary hearing both in form and in substance and, thus, the trial court erred in overruling his plea in abatement. In view of what we have just said concerning the sufficiency of the evidence, this assignment must likewise be overruled. The general rule in this jurisdiction is that any error by the District Court in ruling on a plea in abatement is cured by a subsequent finding by the "trier of fact" of guilt beyond a reasonable doubt. See, *State v. Franklin,* 194 Neb. 630, 234 N.W.2d 610 (1975); *State v. Brehmer,* 211 Neb. 29, 317 N.W.2d 885 (1982); *State v. Lehman,* 203 Neb. 341, 278 N.W.2d 610 (1979). Under the circumstances in this case, this assignment therefore is likewise without merit.

The third assignment of error is that the trial court erred in finding Schmidt guilty of kidnapping,

in that the kidnapping was simply a part of another offense. This argument has been presented to this court on previous occasions and rejected. In *State v. Pankey,* 202 Neb. 595, 598, 276 N.W.2d 233, 235 (1979), quoting from *State v. Goham,* 187 Neb. 34, 187 N.W.2d 305 (1971), we said: " 'The purpose of kidnapping in every instance is to make it possible to commit some other crime. Its very nature therefore embraces other crimes as well as that of kidnapping. The penalties of kidnapping are intentionally more severe than the other crimes which may be included because of the consequences which often result from its perpetration.' " The evidence in this case established a classic kidnapping violation. That violation occurred even before anything more took place. One may not erase the commission of a crime simply because, after committing the crime, a second crime is committed. The assignment is overruled.

Schmidt further argues that even if he had committed the crime of attempted murder, the act was completely and voluntarily abandoned and therefore, under the provisions of the Model Penal Code from which our § 28-201 is patterned, the act of abandonment should be considered as an absolute defense to the instant charge. While it is true that the Model Penal Code, which was used as a guideline by the Legislature when it adopted § 28-201, does contain the defense of abandonment in § 5.01(4) (Tent. Draft No. 10, 1960), it is further true that the defense was not included in the act when adopted by the Legislature. Nor can it be said that the omission of the defense of "voluntary abandonment" in connection with the crime of criminal attempt was either an oversight by the Legislature or due to its failure to know that such a defense could have been included when it adopted the criminal attempt statute in 1977. At the same time that § 28-201 was adopted, the Legislature also enacted Neb. Rev. Stat. § 28-202 (Reissue 1979), the crime of "con-

spiracy." As a part of the crime of criminal conspiracy, the Legislature specifically adopted the defense of abandonment or renunciation of criminal intent. See Neb. Rev. Stat. § 28-203 (Reissue 1979). The defense, however, was limited to the crime of conspiracy under § 28-202, and did not include criminal attempt, § 28-201. Schmidt concedes that this defense has never been adopted in Nebraska but maintains that this court should nevertheless treat abandonment as an affirmative defense to be judicially grafted into the statutes. If that portion of the Model Penal Code is to become a part of the substantive law of the State of Nebraska, it is for the Legislature to do, and not for this court. Since abandonment is not a defense to the commission of the crime of criminal attempt under Nebraska law, Schmidt's assignment of error is without merit.

Schmidt's final assignment of error is that the trial court abused its discretion in sentencing him to two concurrent terms of 7 to 15 years for the offense of attempted murder and 2 to 5 years for the offense of kidnapping. Both the offenses of attempted murder and kidnapping are Class II felonies punishable by a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment. In reviewing the sentences imposed by trial courts we are, of course, bound by our long-established rule that a sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. See, *State v. Beckner,* 211 Neb. 442, 318 N.W.2d 889 (1982); *State v. Prosser,* 209 Neb. 766, 311 N.W.2d 525 (1981). As we have already indicated, the evidence clearly establishes that Schmidt intended, on the day in question, to kidnap his wife and to bring about her death by strangulation. It was only by reason of events beyond his control that he was not able to immediately carry out his plan, and then only because of his wife's pleading and promises did he give up his plan. But for circumstances not of Schmidt's own doing, he might well have been charged with

the murder of his wife. His offers of excuse to the crimes are not very impressive under the circumstances. Kidnapping and attempted murder as Class II felonies are considered by the Legislature to be among the most serious crimes one can commit. The sentences imposed were at the minimum end of the spectrum. We are unable to say that, under the facts of this case, the trial court abused its discretion. The final assignment of error therefore must also be overruled.

Having overruled all of Schmidt's assignments of error, we therefore affirm the judgment and sentences of the trial court.

AFFIRMED.

GILMORE CONSTRUCTION COMPANY, APPELLANT, V. MARVIN D. MILLER AND JOHN HANLON, COMMISSIONER OF LABOR, APPELLEES.

327 N.W.2d 628

Filed December 17, 1982. No. 82-214.

1. **Employment Security Law: Case Overruled.** To the extent that the holding in *A. Borchman Sons v. Carpenter,* 166 Neb. 322, 89 N.W.2d 123 (1958), is understood to provide that both members of nonstriking unions and nonunion employees who may ultimately benefit by reason of a strike called by another union are disqualified from receiving unemployment compensation benefits under the provision of Neb. Rev. Stat. § 48-628(d) (Reissue 1978), even though they are not directly involved in the work stoppage, it is overruled.
2. **Employment Security Law.** Members of nonstriking unions and nonunion employees who are not participating in or financing or directly interested in a labor dispute which caused a work stoppage, and who do not belong to a grade or class of workers who, immediately before the commencement of the stoppage, were members employed at the premises at which the stoppage occurs and are participating in or financing or directly interested in the labor dispute, are not disqualified from receiving benefits under Neb. Rev. Stat. § 48-628(d) (Reissue 1978).

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Dean G. Kratz of McGrath, North, O'Malley & Kratz, P.C., for appellant.

Pamela A. Mattson, for appellee Hanlon.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

KRIVOSHA, C.J.

The appellant, Gilmore Construction Company, appeals from a judgment of the District Court for Douglas County, Nebraska, upholding a decision of the Nebraska Appeal Tribunal, a part of the Nebraska State Department of Labor. The appeal tribunal found that the employee, Marvin D. Miller, was not disqualified from receiving unemployment compensation benefits by reason of being involved in a labor dispute. We believe that the trial court was correct in its decision and therefore affirm the trial court.

Miller is a member of Cement Masons Local No. 538 and was employed by Gilmore Construction Company on a project called "Financial Plaza" located in the city of Omaha, Nebraska. On June 4, 1980, a strike was called by the Omaha carpenters union against contractors in Omaha, Nebraska, including Gilmore. On the first day of the strike, Miller reported to the jobsite and spoke to his foreman. According to Miller, he was told that the equipment necessary to perform the work had been removed by Gilmore and that Miller therefore would be called back to work as "soon as they got it settled." The cement masons did not go on strike in sympathy with the carpenters, and, in fact, after their separate contract expired they worked without a contract until a settlement of the contract for the cement masons was reached. Miller testified that as a cement mason he did not stand to gain or lose in any way by the outcome of the carpenters' strike or the ironworkers' strike because the cement masons

had a separate contract with the employers. Miller further testified that he did not in any way participate in the strike of the carpenters or the ironworkers, nor did he in any way finance the strike of the carpenters or the ironworkers. This testimony, as given by Miller, was not refuted.

The Employment Security Law of Nebraska contains a specific provision regarding claims for benefits filed as a result of a labor dispute. Neb. Rev. Stat. § 48-628(d) (Reissue 1978) provides that an employee shall be denied unemployment benefits "(d) For any week with respect to which the commissioner finds that his total unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed; *Provided,* that this subdivision shall not apply if it is shown to the satisfaction of the commissioner that (1) he is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work, and (2) he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating, financing, or directly interested in the dispute . . . ."

Gilmore points out to us that in the case of *A. Borchman Sons v. Carpenter,* 166 Neb. 322, 328, 89 N.W.2d 123, 127 (1958), we denied unemployment compensation to a member of a union not a member of the striking union on the basis that " ' "a labor dispute that affects the wages, hours of work, and general conditions of employment, causes all employees concerned to be directly interested." ' " Furthermore, in *Borchman* we held, as a matter of law, that the disqualification rule "applies to members of unions who do not strike and to nonunion employees." (Syllabus of the court.)

While there is a split of authority among jurisdictions on this point, we believe that the better-

reasoned cases would reach a conclusion contrary to that which we declared in *Borchman* and therefore would cause us to overrule our previous decision, thereby bringing about the result urged by the Commissioner of Labor. It appears to us that the rationale of *Borchman,* as pointed out by the commissioner, effectively repeals the exemptions contained in § 48-628(d) and brings about just the opposite result intended for by the Legislature. See Annot., 62 A.L.R.3d 380 (1975).

The evidence is undisputed that work stoppage in the first instance was because of a labor dispute. Therefore, in order for Miller to become "requalified," he must show that he was not participating in or financing or directly interested in the labor dispute which caused the stoppage of work *and* that he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in, financing, or directly interested in the dispute.

The evidence, as presented, established without dispute that Miller was not participating in or financing the labor dispute and did not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members who were participating in or financing the dispute. Miller's disqualification could only come about if we were to hold, as we did in *Borchman,* that because Miller was a member of a union, having a contract with the employer, and might indirectly benefit from the strike, he thereby had a "direct interest" in the dispute. The cases from other jurisdictions which have carefully examined the specific language contained in § 48-628(d) and found to the contrary are persuasive. In the case of *Outboard, Marine & Mfg. Co. v. Gordon,* 403 Ill. 523, 536-37, 87 N.E.2d 610, 617 (1949), the Illinois Supreme Court, in reviewing a statute identical to the one in

question, said: "The conclusion is unescapable that the legislature intended to provide for the innocent victims of a labor dispute by specifically excluding them from the denial of unemployment compensation. The previously quoted subsection of section 7 of the Illinois Act was meant to protect and except such victims from the classes denied compensation by its terms. Those who were to be excluded from benefits by the statute were those who attempted to gain by conduct which caused their unemployment or those who actively aided or abetted the previous group, whether or not they gained or lost. A proximity of conduct aiding or abetting the strikers or proximity of result to be gained from the dispute were meant to be the measuring factors. The legislature did not intend to bar, because of remote claims of causation or result, those who were deprived of their employment from the benefits to be received under the act."

And in *Shell Oil Co. v. Cummins,* 7 Ill. 2d 329, 336-37, 131 N.E.2d 64, 68 (1955), the Illinois Supreme Court again, in reviewing the identical statute, said: "The appellant next contends that the 12 craft unions, all members of the same Trades Council, by jointly negotiating with the Company for a single working agreement had placed all their members in the same 'grade or class' so that a strike by one would cause the ineligibility of all. In support thereof, it cites *Brown Shoe Co. v. Gordon,* 405 Ill. 384 [91 N.E.2d 381 (1950)], and *Local No. 658, Boot and Shoe Workers Union v. Brown Shoe Co.,* 403 Ill. 484 [87 N.E.2d 625 (1949)]. In these cases, all production and maintenance workers were members of and represented by the same union local. In both instances, although a new contract had been negotiated by this union and approved by its members, certain workers employed in the lasting department refused to abide thereby, resulting in the involuntary unemployment of other members. We held, upon these facts, that the claimants were of the same

grade and class as the striking bedlasters, and for that reason, denied unemployment compensation benefits. The same reasoning, however, will not apply in the present case. Here we are dealing not with one but with 12 different unions and with 12 different bargaining agents. Although it was customary for these unions to jointly negotiate with the employer and to have the resulting agreement embodied in a single document, yet there was in fact a separate contract existing between the Company and each of the 12 individual unions which, to be effective, required only the ratification of the particular union concerned. This is shown by the fact that in the present case, even though ten unions ratified the agreement, two others were free not only to reject these terms but also to take independent steps to enforce their demands." The Illinois court recognized that while there was some commonality between the unions, there was still independence, and therefore, in effect, it was inappropriate to suggest that each union was directly involved with the other.

In *Ancheta v. Daly,* 77 Wash. 2d 255, 264-65, 461 P.2d 531, 537 (1969), the Washington Supreme Court, reviewing a similar statute, said: " 'The words "directly interested in the labor dispute" are clearly limited in their application to those employees directly interested in furtherance of the dispute by participation and activity therein.' [Citation omitted.] Although there are some shortcomings in this definition of 'directly interested,' we believe that there was no direct interest by the claimants based both upon the lack of participation by the claimants coupled with a recognition that the minimal penny an hour wage increase was in no real sense an economic benefit when compared with the long period during which the claimants were out of work. We are convinced that the claimants were within the relief provisions of RCW 50.20.090 and are entitled to unemployment benefits."

And, finally, in *Wicklund v. Commissioner,* 18

Wash. 2d 206, 217-18, 138 P.2d 876, 882 (1943), the Washington Supreme Court said: " 'The argument is that, inasmuch as every employee was interested in the improvement of his working conditions, rate of pay and other matters related to his employment, therefore, each employee was "directly interested in the labor dispute which caused the stoppage of work." We conclude that this is a strained interpretation of the statute. The clear meaning of the language is to confine disqualification to those who are creating the dispute or participating therein in order to enforce their demands. To accept the prosecutor's construction would render every employe of a business, some of whose employes went on strike, ineligible for benefits, notwithstanding his nonparticipation therein and even though he might be opposed to the labor dispute and decline to have any part therein. The use of the words "directly interested in the labor dispute" clearly limits their application to those employes directly interested in its furtherance by participation and activity therein.'

. . . .

" '. . . [T]he conclusion is inescapable that the Legislature never intended that one, who has purchased his protection against involuntary unemployment, should be denied those benefits because of a "labor dispute" in which he was in no way involved and the causes of which unemployment he, his agents or organization were powerless to avert. To conclude otherwise, it appears to this court, would be to defeat the true and beneficent purposes of the statute and convert that statute into a sham and a mockery with respect to those industrial employees, as appellee, whom it must have been designed to protect against the hazards of enforced unemployment, the causes of which they were helpless to avoid. If such were not so, then a situation could be conceived and easily executed whereby a few persons could accomplish the unemployment of hundreds of innocent victims, entirely faultless in the

matter, and thereby deprive them of compensation benefits which they had bought and paid for.' "

It would have been very easy for the Legislature to draft a statute which would produce the result urged by Gilmore and reached by us in *Borchman*. We must, however, believe that by using the word "direct," the Legislature did not mean to exempt persons "indirectly affected" by a strike called by another union. To hold, as *Borchman* did, that "directly interested" includes not only members of the union and others directly involved but also members who do not strike and nonunion employees who have no control over the strike or the work stoppage is to effectively repeal § 48-628(d). If that is to be done, it should be done by the Legislature and not by the courts.

We believe that to the extent the holding in *Borchman* is understood to provide that both members of nonstriking unions and nonunion employees who may ultimately benefit by reason of a strike called by another union are disqualified from receiving unemployment compensation benefits under the provisions of § 48-628(d), even though they are not directly involved in the work stoppage, it is overruled. The better rule is that members of nonstriking unions and nonunion employees who are not participating in or financing or directly interested in a labor dispute which caused a work stoppage, and who do not belong to a grade or class of workers who, immediately before the commencement of the stoppage, were members employed at the premises at which the stoppage occurs and are participating in or financing or directly interested in the labor dispute, are not disqualified from receiving benefits under § 48-628(d).

We believe that both the Nebraska Appeal Tribunal and the District Court were correct in finding that Miller had met his burden of proving he was within the exceptions of § 48-628(d) and was not disqualified, by reason of the labor dispute, from re-

ceiving unemployment compensation, and we therefore affirm the decision of the District Court which upheld the determination of the Nebraska Appeal Tribunal.

AFFIRMED.

CAPORALE, J., dissenting.

I respectfully dissent. In doing so, I concede that the majority's analysis in this case employs a logical method in defining the phrase "directly interested," as used in Neb. Rev. Stat. § 48-628(d) (Reissue 1978). My difficulty arises from the fact that the question is not an open one; this court in *A. Borchman Sons v. Carpenter,* 166 Neb. 322, 89 N.W.2d 123 (1958), adopted a contrary definition by an equally logical analysis.

For almost 25 years the law in this jurisdiction has been that nonstriking union members are "directly interested" in a work stoppage produced at their place of employment by another union. During this period the Legislature has seen fit to allow our prior construction of its statute to stand. Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's expository analysis of the legislative intent. *The People v. Hairston,* 46 Ill. 2d 348, 263 N.E.2d 840 (1970), *cert. denied* 402 U.S. 972, 91 S. Ct. 1658, 29 L. Ed. 2d 136 (1971); *Santanelli v. City of Providence,* 105 R.I. 208, 250 A.2d 849 (1969); *Nevada Indus. Comm'n v. Strange,* 84 Nev. 153, 437 P.2d 873 (1968); *Hewett v. Garrett,* 274 N.C. 356, 163 S.E.2d 372 (1968); *Chart v. Gutmann,* 44 Wis. 2d 421, 171 N.W.2d 331 (1969), *cert. denied* 397 U.S. 973, 90 S. Ct. 1089, 25 L. Ed. 2d 267 (1970); *Pa. Labor Rel. Bd. v. Uniontown H. Assn.,* 432 Pa. 146, 247 A.2d 621 (1968); *Magreta v. Ambassador Steel Co.,* 380 Mich. 513, 158 N.W.2d 473 (1968). See, also, *Lincoln Woman's Club v. City of Lincoln,* 178 Neb. 357, 133 N.W.2d 455 (1965); *State v. Standard Oil Co.,* 100 Neb. 826, 161 N.W. 537 (1917). If there is to be a change in the ex-

isting law it is not incumbent upon this court to make it. *Lincoln Woman's Club v. City of Lincoln, supra.*

The employer in this case was entitled to rely on the rule announced in *Borchman, supra.* Had the employer been operating under the rule announced today it might well not have caused the removal of its equipment from the employment site in, as it testified, anticipation of the customary refusal of the members of one union to cross the picket line of another union.

One of the values of legal precedent in a society governed by laws is that the certainty created allows a member of that society to accurately and safely anticipate the consequences of specific conduct. While we do not slavishly adhere unnecessarily to precedent for its own sake, the doctrine of stare decisis is based on public policy, is entitled to great weight, and should be adhered to unless reasons therefor do not exist, are clearly erroneous or mischievous, or unless more harm than good will result from doing so. *Lincoln Woman's Club v. City of Lincoln, supra; Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall,* 166 Neb. 588, 90 N.W.2d 50 (1958). Indeed, that we are generally mindful of the disorder which follows sudden departure from clearly established precedent is illustrated by our recent refusal to apply retrospectively the modification of an evidentiary rule. *Langfeld v. Department of Roads, ante* p. 15, 328 N.W.2d 452 (1982).

There is nothing in this record to justify judicial disruption of what has been the settled policy and law of this state for two and one-half decades. By affirming the actions of the Department of Labor and the court below, the majority has permitted an arbitrary administrative usurpation of legislative power.

I would reverse the court below and dismiss the employee's claim.

Cite as 213 Neb. 143

SHIRLEY ANN CAYNOR, APPELLEE, V. DAVID ALAN CAYNOR, APPELLANT.

327 N.W.2d 633

Filed December 17, 1982. No. 82-469.

1. **Records: Appeal and Error.** In the absence of a bill of exceptions it is presumed that the evidence sustained the findings of the trial court. The only issue that can be considered is whether the pleadings support the judgment.
2. **Child Custody: Visitation.** The best interests of the children are the primary concern in the determination of custody and visitation matters.
3. **Criminal Law: Trial: Witnesses.** A prison inmate has no absolute constitutional right to be released from prison so that he can be present at a hearing in a civil action.
4. **Criminal Law: Right to Counsel.** In the absence of a statute there is no authority requiring the appointment of counsel to represent an indigent prison inmate in a private civil matter.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

David Alan Caynor, pro se.

William L. Monahan, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The respondent appeals from the order of the District Court overruling his motion for an order requiring the petitioner to deliver his minor children to Virginia Owen, the respondent's mother, for the purpose of transporting the children to the Nebraska State Penitentiary for visitation with the respondent.

The marriage between the petitioner and the respondent was dissolved on July 30, 1980. Custody of the two minor children, April Marie, born January 27, 1979, and Crystal Ann, born April 1, 1980, was awarded to the petitioner "subject to reasonable rights of visitation by the Respondent."

The respondent is presently imprisoned in the Nebraska State Penitentiary. Upon the filing of the

motion, the trial court entered an order requiring the petitioner to appear and show cause on May 14, 1982, why she should not be held in contempt for refusing to provide reasonable visitation. On May 10, 1982, the respondent filed a second motion, requesting that an attorney be appointed to represent him and that the warden be ordered to permit the respondent to be transported to Omaha so that he could appear in person at the hearing on May 14, 1982.

The respondent's motion, filed May 10, 1982, was overruled but without prejudice to the "Penn. authorities to transport this resp. to Omaha if they chose to so do." The matter was continued to May 25, 1982, so that the respondent could present evidence by deposition, written interrogatories, "or other means provided by statute."

No bill of exceptions has been filed in this case. The applicable rule is that in the absence of a bill of exceptions it will be presumed that the evidence sustained the findings of the trial court. The only issue that can be considered is whether the pleadings support the judgment.

In *Casper v. Casper,* 198 Neb. 615, 254 N.W.2d 407 (1977), a case involving a similar question, we pointed out that the best interests of the children are the primary concern in the determination of custody and visitation matters. Such a determination is of necessity one which is factual in nature. Ordinarily, there is no obligation on the custodial parent to transport the children to another city for the purpose of visitation or to deliver the children to a third person for that purpose. On the record presented, there is no basis upon which the judgment of the trial court in this case could be said to be erroneous.

The respondent's contention that he was entitled to the appointment of counsel and an order directing that he be transported to Omaha so that he could appear in person at the hearing on his motion is equally without merit. A prison inmate has no ab-

solute constitutional right to be released from prison so that he can be present at a hearing in a civil action, and there is no authority which requires the appointment of counsel to represent him in a private civil matter. See, *State v. Otey,* 212 Neb. 103, 321 N.W.2d 453 (1982); *Matter of Warden of Wisconsin State Prison,* 541 F.2d 177 (7th Cir. 1976); *Ball v. Woods,* 402 F. Supp. 803 (N.D. Ala. 1975), *aff'd and modified without opinion* 541 F.2d 279 (5th Cir. 1976).

The judgment of the District Court is affirmed.

AFFIRMED.

JERALD JOHNSEN, APPELLANT, V. ROBERT HARPER, APPELLEE,
BATTLE CREEK MUTUAL INSURANCE COMPANY, GARNISHEE-APPELLEE.

328 N.W.2d 192

Filed December 23, 1982. No. 44501.

1. **Insurance: Contracts.** Contracts of insurance, like other contracts, are to be construed according to the meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms will be taken and understood in plain, ordinary, and popular sense.
2. **Insurance: Words and Phrases.** The term "private passenger automobile," as used in the "drive other vehicle" coverage section of an automobile liability insurance policy, is clear and unambiguous and does not include a pickup truck.

Appeal from the District Court for Madison County: MERRITT C. WARREN, Judge. Affirmed.

John R. Thomas and Roger W. Wells of McGrath, North, O'Malley & Kratz, P.C., for appellant.

Jewell, Otte, Gatz, Collins & Domina, for appellee Battle Creek.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, HASTINGS, and CAPORALE, JJ.

HASTINGS, J.

This was an action in garnishment to determine the liability of Battle Creek Mutual Insurance Company to the garnisher, Jerald Johnsen, under a certain policy of automobile liability insurance. Johnsen has appealed from an order sustaining Battle Creek's motion for summary judgment, the effect of which was to determine that no coverage existed under the policy of insurance as to this particular incident. The garnishment action was ordered dismissed.

On May 11, 1978, Johnsen was a passenger on a motorcycle and suffered injuries when the motorcycle was struck by a pickup truck being operated by Robert Harper. The pickup truck was owned by Collins Millwork and was used as a business vehicle, although at the time of the accident Harper was not using it in the course of any employment by Collins. At the time of the accident, Battle Creek had issued a policy of automobile liability insurance to the parents of Robert Harper which did not list the pickup truck as a covered vehicle. The policy did provide coverage to any relative of the named insured with respect to the use of a nonowned automobile "but only with respect to a *private passenger automobile* or trailer . . . ." (Emphasis supplied.) The policy goes on to define a *private passenger automobile* as "a four wheel *private passenger,* station wagon or jeep type *automobile.*" (Emphasis supplied.) The policy defines a utility vehicle as "an automobile, other than a farm automobile, with a capacity of fifteen hundred pounds or less of the pick-up body . . . type . . . ."

As is quite apparent, there was no coverage and no liability on the part of Battle Creek if the pickup truck being driven by Harper at the time of the accident was not a *private passenger automobile.* Both Battle Creek and Johnsen filed motions for summary judgment, Battle Creek contending that there was no issue as to any material fact, and Johnsen

reciting that he was entitled to judgment on the pleadings as a matter of law. However, Johnsen now contends that the trial court erred either in failing to construe the language of the policy as clearly favoring the appellant's position that the vehicle was covered by the policy, or that it should have found the language ambiguous, in which event this court should remand the case for further proceedings.

Although, as suggested in *County of Douglas v. OEA Senior Citizens, Inc.*, 172 Neb. 696, 111 N.W.2d 719 (1961), there is a tacit agreement that the facts are not in dispute in a case where both parties, on the basis of the same record, have moved for summary judgment in their favor, we believe that the record adequately demonstrates that there was no genuine issue of fact.

Contracts of insurance, like other contracts, are to be construed according to the meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms will be taken and understood in plain, ordinary, and popular sense. *Rodriguez v. Government Employees Ins. Co.*, 210 Neb. 195, 313 N.W.2d 642 (1981).

The term "private passenger automobile" is clear and unambiguous and it does not include a pickup truck. "The policy defines 'private passenger automobile' as a 'four wheel private passenger, station wagon, or jeep type automobile.' Even if the phrase 'private passenger automobile' stood alone, the plain and ordinary meaning of these words would exclude a pickup truck. . . . In the present policy, however, the phrase does not stand alone. The policy expressly defines the term 'utility automobile' to mean 'an automobile * * * with a load capacity of fifteen hundred pounds or less *of the pickup body,* * * * not used for business or commercial purposes.' " *Ohio Casualty Insurance Co. v. Tyler,* 85 Ill. App. 3d 410, 413, 407 N.E.2d 77, 79 (1980). See, also, *Hercules Casualty Ins. Co. v. Preferred Risk Ins. Co.*, 337 F.2d 1 (10th Cir. 1964); *Cotton States Mut. Ins. Co. v.*

Hutto, 115 Ga. App. 164, 154 S.E.2d 375 (1967).

We have examined the cases of *State Farm Mutual Automobile Ins. Co. v. Durrett,* 472 S.W.2d 214 (Tex. Civ. App. 1971); *Riker v. Aetna Casualty & Surety Company,* 286 So. 2d 493 (La. App. 1973); *Schilling v. Stockel,* 26 Wis. 2d 525, 133 N.W.2d 335 (1965); and *Detmer v. United Security Insurance Company,* 309 S.W.2d 713 (Mo. App. 1958), cited by appellant Johnsen. They found the term "private passenger automobile" to be ambiguous and construed the contract against the insurance company. We reject such a conclusion under the facts of this case.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

ILA D. ANDREWS, APPELLANT, V. CITY OF FREMONT, NEBRASKA, APPELLEE.

328 N.W.2d 194

Filed December 23, 1982. No. 81-609.

1. **Municipal Corporations: Actions.** A petition in error is designed to review the decision of the inferior tribunal. It is not to act as a super legislative or administrative agency to come to an independent conclusion.
2. **Courts: Municipal Ordinances: Appeal and Error.** Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will the Supreme Court.
3. **Appeal and Error.** New evidence is not permitted in the appellate court to determine if errors of law occurred in the tribunal giving rise to the error proceeding.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Avis R. Andrews of Kuhlman Law Offices, for appellant.

Lyle B. Gill, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

WHITE, J.

This is an appeal from the decision of the District Court for Dodge County, Nebraska, which affirmed a decision by the city council of the City of Fremont, Nebraska, on petition in error and refused to subdivide a tract of land in Chase's Addition to the City of Fremont, Dodge County, Nebraska. The tract is described as the north 66 feet of Lots 3 and 4, Block 34. The portion of Lot 4 owned by the petitioner in error is 66 feet north to south and Lot 4 is 66 feet wide. The portion of Lot 3 owned by petitioner in error measures 66 feet by 74 feet. Before considering the assignments of error, it is well to review the type of action that was presented to the District Court and to this court.

The appellant, Ila D. Andrews, filed a petition in error in the District Court under the provisions of Neb. Rev. Stat. § 25-1901 (Reissue 1979). "A judgment rendered, or final order made, by any tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court." The transcript presented to the District Court consists of only two documents. One is a document entitled "APPLICATION TO SUBDIVIDE REAL ESTATE," and provides as follows: "TO THE HONORABLE MAYOR AND CITY COUNCIL FREMONT, NEBRASKA GENTLEMEN: I, ILA D. ANDREWS OWNERS OF THE NORTH 66 FEET OF LOTS 3 AND 4, BLOCK 34, CHASES ADDITION HEREWITH FILE AN APPLICATION TO SUBDIVIDE THE ABOVE INTO TWO (2) LOTS The north 66 feet of Lot 3, Block 34, Chases Addition with front, side and rear yard variances. The north 66 feet of Lot 4, Block 34, Chases Addition with front, side and rear yard variances. Very truly yours . . . ."

The transcript also contains the summary of the

minutes of the meeting of the planning commission on June 16, 1980, as follows: "Attorney Avis Andrews was present, representing Ila D. Andrews, and stated that in 1969 permission was received from the City to move a second house onto this property. The question was raised at the last meeting whether or not there was any authority for the Planning Commission to approve this request. Miss Andrews felt the Planning Commission had the authority to approve as these properties fit into the character of the neighborhood — one for rental and the other the owners home. Not being able to subdivide presents an unreasonable hardship — first it presently restricts her ability to transfer the property; and second this situation existed at the time the ordinance was adopted and now is considered non-compliance.

"Attorney Lyle Gill explained that the City Council passed Ordinance No. 2980 and set forth requirements before a request of this nature could be granted. This ordinance binds everyone in city government, the City Council as well as the Planning Commission. The request does not comply with the requirements of the Ordinance. Moved by Hansen, seconded by Gifford to recommend denial of the request. Roll Call Vote showed all members voting aye — 9 aye. Motion Carried."

The transcript also contains excerpts from the meeting of the city council of Fremont, Nebraska, on June 24, 1980, in part as follows: "The City Clerk read a resolution offered by Councilman Mussack, seconded by Councilman Row permitting Ila D. Andrews permission to subdivide north 66 feet of Lots 3 and 4, Block 34, Chase's Addition into two lots. Avis Andrews, Attorney for Mrs. Andrews spoke in favor of this subdivision. This was denied by the Planning Commission. Roll call vote showed all Councilmen present voting nay — 6 nays. Thereupon the Mayor declared the resolution failed."

The transcript was appropriately filed by the ap-

pellant in the District Court. It did not include a copy of the ordinance under which the application was presented and denied, nor any transcript of evidence other than that summarized at the planning commission hearing. Apparently confusing an action under § 25-1901 with a review de novo, attorneys for both the city and the applicant sought permission to and were allowed to introduce evidence in the District Court consisting of the various ordinances of the City of Fremont and a stipulated set of facts reciting in great detail the facts surrounding the ownership and time sequence of various activities with respect to the subject property. No objection was made to this evidence and, apparently, the District Court considered it in its decision. The trial court and the parties misconstrued the function of a petition in error. A petition in error is designed to review the decision of the inferior tribunal. It is not to act as a super legislative or administrative agency to come to an independent conclusion. First, we observe that the decision not to subdivide the property of the petitioner in error was a judicial decision by the city council, apparently acting as a board of adjustment pursuant to Neb. Rev. Stat. § 19-910 (Reissue 1977), as distinguished from a purely legislative act which must be challenged collaterally. *Scottsbluff Improvement Assn. v. City of Scottsbluff,* 183 Neb. 722, 164 N.W.2d 215 (1969).

As stated before, the transcript which was filed in the District Court, and which is brought to this court on appeal, does not contain the ordinances. Each of the nine assignments of error presented to the District Court and presented to this court refers to the ordinances of the City of Fremont, which simply were not before the District Court and are not before us as they did not appear in the transcript of the proceedings had before the city council of the City of Fremont, and we are powerless to review them. Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the

record, nor will the Supreme Court. *Dell v. City of Lincoln,* 168 Neb. 174, 95 N.W.2d 336 (1959); *City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co.,* 201 Neb. 405, 268 N.W.2d 98 (1978).

New evidence is not permitted in the appellate court to determine if errors of law occurred in the tribunal giving rise to the error proceeding. *Dovel v. School Dist. No. 23,* 166 Neb. 548, 90 N.W.2d 58 (1958); *Dlouhy v. City of Fremont,* 175 Neb. 115, 120 N.W.2d 590 (1963).

Where errors assigned require review of evidence in error proceedings, they cannot be considered in the absence of a bill of exceptions. *Lanc v. Douglas County Welfare Administration,* 189 Neb. 651, 204 N.W.2d 387 (1973).

It is important to note, as we held by inference in *Ross v. The Governors of Knights of Ak-Sar-Ben,* 199 Neb. 513, 260 N.W.2d 202 (1977), that the transcript must contain all of the evidence relied on for reversal in the District Court or the question will be limited, as it is here limited, only to whether the transcript supports the judgment of the city council of Fremont, Nebraska. We are unable to determine that it does not, since all the errors claimed relate to the application of evidence to the ordinances and only a bare narrative of the facts is before us and none of the ordinances. Appellant remains free to refile her application for subdivision with the city council and to make a proper record with that tribunal.

Since we have nothing to review, as was the case in the District Court, the decision of the District Court is affirmed.

AFFIRMED.

Cite as 213 Neb. 153

IN RE ESTATE OF MARY FLIDER, DECEASED. WILLARD HANNA ET AL., APPELLEES, V. DARLENE R. WARNICK, APPELLANT.

328 N.W.2d 197

Filed December 23, 1982. No. 81-618.

1. **Wills.** If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed, subject to rebuttal. Neb. Rev. Stat. § 30-2430(b) (Reissue 1979).
2. _____. The presumption of due execution arising from the acknowledgment of a self-proved will may be attacked by proof of fraud or forgery affecting the acknowledgment or affidavit. Neb. Rev. Stat. § 30-2430(b) (Reissue 1979).
3. _____. In the absence of proof that the formalities required by the statute were not complied with, the presumption of due execution raised by the acknowledgment is conclusive.
4. _____. Due execution means the signing of the will by the testator, and the attestation. Testamentary capacity is not a component of due execution under the statute.
5. **Jury Instructions: Appeal and Error.** The giving of an incorrect instruction which may have affected the result unfavorably to the party complaining constitutes reversible error.
6. **Wills.** A prior will, executed when the testator's testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to the results produced to the instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capacity by showing that the testator had a constant and abiding scheme for the distribution of his property.

Appeal from the District Court for Pawnee County: ROBERT T. FINN, Judge. Reversed and remanded for a new trial.

Richard T. Halbert, for appellant.

Thomas L. Morrissey, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

BOSLAUGH, J.

This is an appeal in a will contest involving the will of Mary Flider, deceased. The will, which was executed February 11, 1977, was admitted to probate

in the county court. Upon appeal to the District Court the will was denied probate.

The proponent, Darlene R. Warnick, was a niece of the deceased and is the personal representative and sole beneficiary named in the will. She has appealed.

The contestants, Willard Hanna and Lorene M. Herman, are heirs of the testatrix. They alleged that the will had not been executed as required by law, that the testatrix lacked testamentary capacity, and that the will was the result of undue influence.

Attached to the will was an acknowledgment signed by the testatrix and the witnesses, which complied with Neb. Rev. Stat. § 30-2329 (Reissue 1979). This constituted the will a "self-proved will." See *In re Estate of Camin,* 212 Neb. 490, 323 N.W.2d 827 (1982). At the trial the attorney who prepared the will testified on behalf of the proponent regarding the formalities of the signing and witnessing of the will. The contestants produced no evidence challenging either the signatures or the witnessing of the will. The proponent's motion for a directed verdict on the issue of due execution was overruled and the issue of due execution was submitted to the jury.

The proponent assigns as error the trial court's overruling of her motion for directed verdict on the issue of execution. The proponent contends that where the will is self-proved, a conclusive presumption arises that signature requirements have been met. The contestants argue that proof of due execution also requires proof of testamentary capacity, an issue upon which there was conflicting evidence.

Neb. Rev. Stat. § 30-2430(b) (Reissue 1979) prescribes the effect to be given a self-proved will: "If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any wit-

ness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit."

The comment to the section states that the conclusive presumption applies to such question as whether the witnesses signed in the presence of the testator. It does not preclude proof of lack of testamentary capacity or undue influence.

The purpose of the self-proved provision of the statute is to expedite formal testacy proceedings. A self-proved will may not be contested in regard to signature requirements. *Matter of Estate of Mackaben*, 126 Ariz. 599, 617 P.2d 765 (1980). However, the formal requisites for execution of the will must appear, either preceding the self-proving affidavit or as supplemental in the affidavit. In the absence of proof that the formalities required by the statute were not complied with, the presumption of due execution raised by the acknowledgment is conclusive. See *In the Matter of Sample*, 175 Mont. 93, 572 P.2d 1232 (1977).

Neb. Rev. Stat. § 30-2327 (Reissue 1979) defines "execution" as follows: "Except as provided for holographic wills, writings within section 30-2338, and wills within section 30-2331, every will is required to be in writing signed by the testator or in the testator's name by some other individual in the testator's presence and by his direction, and is required to be signed by at least two individuals each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will." Under the statute, testamentary capacity is not a component of due execution.

Due execution means compliance with the formalities required by the statute in order to make the instrument the will of the testatrix. The presence of an attestation clause which recites the facts necessary to the validity of a will raises a presumption of due execution. *In re Estate of Kaiser*, 150 Neb. 295, 34 N.W.2d 366 (1948).

Upon the record in this case the proponent was entitled to a directed verdict on the issue of execution. The will being self-proved, and there being no proof of fraud or forgery, a conclusive presumption was raised as to signature requirements, that is, the formalities described in § 30-2327. The jury was not free to find against the proponent on the issue of execution.

The giving of an incorrect instruction which may have affected the result unfavorably to the party complaining constitutes reversible error. *Oban v. Bossard*, 201 Neb. 243, 267 N.W.2d 507 (1978). It was reversible error to submit to the jury an issue upon which no question of fact had been raised and which may have been the basis for the verdict. *Watters v. City of Omaha*, 86 Neb. 722, 126 N.W. 308 (1910); *Simcho v. Omaha & C. B. St. Ry. Co.*, 150 Neb. 634, 35 N.W.2d 501 (1949); *McCarty v. Morrow*, 173 Neb. 643, 114 N.W.2d 512 (1962); *Simet v. Sage*, 208 Neb. 13, 301 N.W.2d 600 (1981).

The proponent also assigns as error the refusal to admit into evidence a prior will of the testatrix. A will drawn and signed by her in 1972 was offered to show that she had a consistent scheme for the disposition of her property and did not lack testamentary capacity and was not subject to undue influence in making the later will. In the 1972 will the testatrix left all of her property to the proponent's parents. At the time the second will was made, the proponent's father was deceased and her incapacitated mother lived with the proponent.

A prior will is admissible in evidence, subject to the following rule: " ' "A prior will, executed when the testator's testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to results produced to the instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capaci-

ty by showing that the testator (and grantor) had a constant and abiding scheme for the distribution of his property." ' *In re Estate of Bose*, 136 Neb. 156, 173-74, 285 N.W. 319, 329 (1939). See, also, *Blochowitz v. Blochowitz*, 122 Neb. 385, 240 N.W. 586 (1932); *In re Estate of Wahl*, 151 Neb. 812, 39 N.W.2d 783 (1949). An essential element of this rule was pointed out in an earlier sentence in *Bose* wherein we noted that prior wills, 'as to which there are no substantial claims of testamentary incapacity,' may also be considered in determining the question of testamentary capacity. *In re Estate of Bose, supra* at 170, 285 N.W. at 327." *In re Estate of Camin*, 212 Neb. 490, 503-04, 323 N.W.2d 827, 836 (1982).

The burden of proof is on the proponent to establish adequate foundation for the admission of a prior will in evidence. This includes proof of testamentary capacity at the time the prior will was executed. *In re Estate of Camin, supra.*

It is unnecessary to consider the other assignments of error.

The judgment of the District Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

ROBERT MAURER, APPELLANT, V. WALTER D. WEAVER, DIRECTOR OF INSURANCE, STATE OF NEBRASKA, APPELLEE.

328 N.W.2d 747

Filed December 23, 1982. No. 81-624.

1. **Administrative Agencies: Records: Appeal and Error.** The failure of an administrative agency to prepare and transmit to the court a certified transcript of the proceedings had before it within 15 days after service of the petition, pursuant to Neb. Rev. Stat. § 84-917(4) (Reissue 1981), does not, in and of itself, entitle the party seeking review to have the agency's order set aside.
2. _____: _____: _____. Where appeals are taken from an ad-

> ministrative agency to the District Court, pursuant to the provisions of Neb. Rev. Stat. § 84-917 (Reissue 1981), the certified transcript as prepared by the agency and transmitted to the court shall be considered to be before the court and shall, unless objected to by one of the parties, be considered without the need of either party formally offering the record into evidence.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded with directions.

Craig F. Swoboda and George O. Rebensdorf of Swoboda & Katz, for appellant.

Paul L. Douglas, Attorney General, and Mel Kammerlohr, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

KRIVOSHA, C.J.

This appeal presents to the court what appears to be two questions of first impression concerning appeals from an administrative agency to the District Court, pursuant to the provisions of the Nebraska Administrative Procedures Act, Neb. Rev. Stat. §§ 84-901 to 84-916 (Reissue 1981). The first question requires us to determine the effect of the failure of the agency from which the decision is being appealed to file in the District Court a full certified transcript of the proceedings before the agency as required by Neb. Rev. Stat. § 84-917(4) (Reissue 1981). The second question requires us to determine whether either party to the appeal is required at the trial before the District Court to mark and offer in evidence the certified transcript prepared by the agency and filed in the District Court.

On August 27, 1979, the Department of Insurance of the State of Nebraska (Department) conducted a hearing on a complaint filed by the Department against the appellant, Robert Maurer. During the course of the hearing, testimony of witnesses was presented, evidence was adduced, and exhibits were

introduced, all apparently pursuant to the provisions of § 84-914. As a result of the hearing, the Department, on September 19, 1979, issued an order suspending Maurer's resident insurance agent's license for 1 year. Pursuant to the provisions of § 84-917 Maurer appealed the Department's order to the District Court for Lancaster County, Nebraska. Within 30 days after the service of the final decision by the Department, Maurer filed a petition for review in the District Court pursuant to the provisions of § 84-917(2). At the same time he also filed a praecipe requesting that a summons be served upon the Director of Insurance as required by § 84-917(2). On November 2, 1979, the Department filed with the clerk of the District Court a certified transcript purporting to be a full and correct copy of the hearing held before the Department on August 27, 1979. The transcript appears to be the verbatim testimony given by the parties at the hearing before the Department.

On March 16, 1980, Maurer filed a document entitled "Motion to Strike" in the District Court. The purpose of the motion was to strike the transcript previously filed by the Department with the clerk of the District Court, for the reason, among other matters, that the transcript, as filed, was not in fact a complete and full transcript and, in particular, did not include the final decision sought to be vacated by the appellant. Following a hearing on the motion the trial court overruled the motion but directed the Department to file a supplemental transcript containing the findings of fact and conclusions of law prepared by the Department and filed in the case. The supplemental transcript was filed with the clerk of the District Court on May 13, 1981. In addition to the findings of fact and order, the supplemental transcript contained all the verbatim testimony as well as all the exhibits.

On June 10, 1981, a further hearing was held before the District Court. At that time Maurer offered into

evidence a certified copy of the Department's rule 26. Neither party offered in evidence the supplemental transcript.

Following the hearing the trial court found that because neither party had marked and offered in evidence the supplemental transcript, the court did not have before it a transcript and bill of exceptions and therefore had nothing to rule upon. The trial court therefore ordered that Maurer's petition on appeal be dismissed and that his license be suspended for a period of 1 year, as earlier ordered by the Department. It is from that order which Maurer has now appealed to this court. We believe, for reasons more particularly set out in this opinion, that the order of the District Court dismissing the appeal must be reversed and the case remanded to the District Court for further proceedings.

In reaching our conclusion we turn first to the question concerning the Department's failure to file a full and complete transcript within the time prescribed by law. Maurer argues that there is an absolute obligation imposed upon the Department to file a complete certified transcript within 15 days after service of the petition by the appellant and that, if the Department fails to do so, the party appealing must prevail. Maurer cites us, however, to no case directly on point previously decided by this court. In essence, Maurer seems to be arguing that if the Department fails to file the transcript within the prescribed time, the District Court has no alternative but to find for the appellant. We are unable to accept that argument. We believe that a more reasonable reading of the statutory provisions governing appeals from administrative agencies would be to the contrary.

Section 84-917 sets out what must be done in order to perfect an appeal to the District Court from an order entered by an agency. Section 84-917(2) specifically provides: "Proceedings for review *shall be instituted* by filing a petition in the district court

of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. Summons shall be served as in other actions . . . ." (Emphasis supplied.) Section 84-917(4) then provides: "Within fifteen days after service of the petition *or within such further time as the court for good cause shown may allow*, the agency shall prepare and transmit to the court a certified transcript of the proceedings had before it . . . ." (Emphasis supplied). It appears to us that a simple reading of the statute clearly provides that in order for the District Court to acquire jurisdiction under the Administrative Procedures Act two steps must be taken. The first step is the filing of the petition within 30 days, and the second step is causing a summons to be issued and served within 6 months. See *Leach v. Dept. of Motor Vehicles, ante* p. 103, 327 N.W.2d 615 (1982), The preparation and filing of the transcript under the Administrative Procedures Act, as opposed to error proceedings, while critical to the ultimate disposition of the case, is not jurisdictional. See, Neb. Rev. Stat. §§ 25-1903, 25-1905 (Reissue 1979); *Lanc v. Douglas County Welfare Administration*, 189 Neb. 651, 204 N.W.2d 387 (1973); *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976). The Department urges us to sustain the action of the trial court on the basis of our earlier decision in *Lanc v. Douglas County Welfare Administration, supra*. *Lanc* has no application in the instant case. *Lanc* involved an error proceeding brought pursuant to Neb. Rev. Stat. §§ 25-1901 to 25-1908 (Reissue 1979). That proceeding requires the filing of the transcript with the petition and imposes the burden upon the plaintiff in error. In *Lanc* a certified transcript was not filed at all with the District Court, and therefore the District Court did not acquire jurisdiction. Once Maurer filed his petition and his praecipe for summons, the District Court, in the instant case, ac-

quired jurisdiction. Any further action by the agency which was in any manner defective is not sufficient to entitle the appellant to obtain summary relief. The interest of justice could not possibly be served if we were to hold that the failure of the agency to file the transcript within 15 days entitles the appellant to prevail, any more than it would be appropriate to say that the agency's failure to file the transcript within the 15-day period entitles the agency to prevail, as was permitted in this case. Section 84-917(4) contemplates that additional time may be ordered by the court and that failure of the agency to seek that order within the 15-day period does not preclude the court for good cause shown to allow additional time. We believe that the agency's failure to file a complete transcript in the first instance, while certainly not commendable, was not so defective as to preclude the trial court from ordering a supplemental transcript and, upon receiving the supplemental transcript, considering the entire record. We therefore hold that the failure of an administrative agency to prepare and transmit to the court a certified transcript of the proceedings had before it within 15 days after service of the petition, pursuant to § 84-917(4), does not, in and of itself, entitle the party seeking review to have the agency's order set aside. The trial court was correct in ordering a supplemental transcript.

We then turn to the question of who, if anyone, must mark and offer the certified transcript of the proceedings into evidence before the District Court in order for the District Court to review the proceedings. As we have indicated, the trial court held that such a requirement did exist and the failure of one of the parties to take such action precluded the trial court from having before it the certified transcript for review. We believe, however, that neither the provisions of the statute nor sound logic requires such a rule. Section 84-917(5) specifically provides: "The review shall be conducted by the court

without a jury on the record of the agency." No one argues that the record in this case was not ultimately prepared and before the District Court. The argument is that no one performed the magical rite of marking the transcript and reciting the magic words over the paper, to wit, "I offer in evidence exhibit 1." It is clear that, in a trial, evidence must be marked and offered so that both the trial court, in the first instance, and the appellate court, on review, can determine what is the record. But where the record is prescribed by law and both parties, absent objection, agree that the record is lying on the table in front of the court, we cannot believe that if either party refuses to present the record to the court, the record is thereby eliminated and the court's obligation to review the record is waived. Section 84-917(5) does not provide that the review shall be conducted by the court on the record of the agency offered to the court but, rather, "on the record of the agency." It is the record of the agency which § 84-917(4) requires the agency to prepare, certify, and transmit to the court. In effect, the agency, in preparing the certified record and "transmitting it to the court," offers the record in evidence. This apparently was the rationale behind the Legislature's specifically amending the statutes with regard to appeals from county and municipal courts to District Courts and providing that, in such cases, filing the bill of exceptions with the clerk at or before the hearing shall constitute the equivalent of offering the record in evidence unless the court, on objection by a party, excludes all or a part of it. Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982). That, undoubtedly, must be the reason why the Legislature provided that the agency was required to prepare "an official record, which shall include testimony and exhibits, in each contested case . . . ." See § 84-913. We therefore hold that where appeals are taken from an administrative agency to the District Court, pursuant to the provisions of § 84-917, the

certified transcript as prepared by the agency and transmitted to the court shall be considered to be before the court and shall, unless objected to by one of the parties, be considered without the need of either party formally offering the record into evidence. Having so concluded, we must therefore remand this case back to the District Court with directions that it now review the supplemental record as filed with the court and determine whether the decision of the Department of Insurance should be affirmed, modified, or reversed.

REVERSED AND REMANDED WITH DIRECTIONS.

RAYMOND YATES, APPELLANT, V. MILDRED GROSH ET AL., APPELLEES.

328 N.W.2d 200

Filed December 23, 1982. No. 81-713.

Contracts: Specific Performance. A party seeking specific performance of an oral contract upon the basis of part performance must prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in part performance were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract, and further that nonperformance by the other party would amount to a fraud upon the party seeking specific performance.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

Ronald A. Ruff of Ruff & Murphy, for appellant.

Paul D. Merritt, Jr., William P. Mueller, and J. A. Lane of McGinley, Lane, Mueller, Shanahan, O'Donnell & Merritt, for appellees.

KRIVOSHA, C.J., HASTINGS, and CAPORALE, JJ., and RIST, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Raymond Yates (Ray), plaintiff-appellant, seeks

specific performance of an alleged oral contract with his father, Benjamin Yates (Ben), to give the home farm to Ray. Upon trial, the District Court of Lincoln County dismissed the petition for failure of proof. Plaintiff appeals.

A chronology of events covers the period 1950-78. In *1950*, Ben and his wife, Cora, owned as joint tenants the 960-acre home farm occupied by them and three children including Ray, age 15 years; Ray had quit school without completing the ninth grade. Ray claims Ben orally promised to give him the farm if he would stay at home and work; Ray stayed at home and worked. In *1955*, Ray married and lived on the farm with his parents; Ray contends Ben renewed his promise to give him the farm if he would not leave the farm and seek railroad employment. In *1956*, Ray and Ben began a 50-50 farm partnership. In *1957*, a tornado destroyed the farm buildings; Ray bought the adjoining Snavely farm and both families moved there; title to the Snavely farm was taken in the names of Ray and Ben for convenience to protect Ben who had included the home farm as added security for the Snavely purchase mortgage. In *1965*, Ray bought the Carter farm with joint title vested in the same manner and purposes as the Snavely farm; later Ray bought another farm in his own name. He now owns 2,500 acres of land. In *1968*, Ben and Cora moved to North Platte, Nebraska; on January 1, 1968, Ray and Ben terminated their partnership by written agreement, including a gift to Ray of Ben's interest in the farm machinery, livestock, and supplies; March 1, 1968, the home farm was leased to Ray for 1 year on terms of $2,500 cash and crop rents; Ray continued to occupy the farm under these lease terms until 1978. Ray claims Ben again promised the farm to him. In *1969*, Ben and Cora filed a federal gift tax return reporting gifts to Ray valued at $33,962; September 8, 1969, Ben and Cora executed identical wills. In *1970*, Cora died. Ben died May 28, *1978*, at age 88

years; his 1969 will was admitted to probate October 18, 1978. Material here are the provisions of the will that devised the home farm to four older daughters, Mildred, Florence, Mary, and Gladys as residuary beneficiaries, and the following: "I am not unmindful that I have not provided for my beloved son, Raymond Yates, in this my Last Will and Testament, not from lack of love and affection, but for the reason that I have, during my lifetime in my opinion, given him his full share of my estate."

There is no record of Ray having agreed to any alleged promise or terms of a contract.

It is plaintiff's theory that he relied on his father's oral promises to give him the farm if he would stay at home and do the farmwork; that he did so for 28 years without compensation except groceries, farm expenses, and other miscellaneous items, which was partial performance of the claimed contract. Ray's evidence concerning compensation was evasive and inconclusive.

There is little conflict in the evidence that Ray did occupy the farm up to 1979, and beginning in 1950 his farming duties and responsibilities increased as he matured and Ben's farmwork decreased as he became older. There is conflict in the evidence as to all of the other issues, facts, and circumstances.

Both express and implied contracts have their foundation in the consent of the parties. "An action in contract inevitably rests upon a promise or set of promises. A promise may be stated in words, either oral or written, or may be inferred wholly or partly from conduct." *Clark & Enersen, Hamersky, S., B. & T., Inc. v. Schimmel Hotels Corp.*, 194 Neb. 810, 813, 235 N.W.2d 870, 872 (1975).

The primary error assigned is the finding of the trial court that plaintiff's proof was not clear and satisfactory.

Plaintiff's testimony concerning Ben's oral promises shows: *1950* "Q. Who was present at the time? A. My mother, and dad and me. . . . Q. What was

the agreement? A. The agreement was that I was supposed to get the farm if I stayed home and did the work." *1955* "Q. Who was present? A. My wife was present; my brother-in-law, Harvey Hiatt; my sister, Gladys; and my mother, and my dad. . . . Q. What did your dad say? A. He said if I would stay and continue the farm would sure be mine." Gladys and Harvey Hiatt corroborated this testimony. Gladys Hiatt, another daughter from a previous marriage, was disinherited by the terms of Ben's will. *1968* "Q. All right. Who was present? A. My mother, and me, and my wife and my dad. . . . Q. What was said about the land? A. The land was supposed to be mine. Q. Did your father say how the land was going to get to you when it's mentioned right in this lease agreement that it belongs to him and your mother? A. He supposedly made a will leaving me the land. Q. He told you that at that time? A. Yes, he did."

" 'Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.' " *Rudolph v. Hartung*, 202 Neb. 678, 686, 277 N.W.2d 60, 64 (1979). " 'It is very proper that the assertion of such a contract, especially when it is claimed to be entirely in parol, should be regarded by the court with grave suspicion, and the establishment thereof required by evidence which clearly indicates the minds of the parties met upon the terms of the contract sought to be established.' " *Id.* at 683, 277 N.W.2d at 63.

"We have consistently required that a party seeking specific performance of an oral contract for the sale of real estate upon the basis of part performance must prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in part performance were referrable solely to the contract sought to be enforced, and not such as might be referrable to some other or

different contract, and further that nonperformance by the other party would amount to a fraud upon the party seeking specific performance." *Reifenrath v. Hansen*, 190 Neb. 58, 63, 206 N.W.2d 42, 45 (1973); *In re Estate of Layton*, 212 Neb. 518, 323 N.W.2d 817 (1982).

We measure plaintiff's evidence against the above standards. At the outset, it is improbable that Ben would make the claimed promise to a 15-year-old son, particularly where another son, Joseph, had just graduated from the agricultural high school at Curtis, Nebraska. Further, the claimed partial performance is without support during the 1950-57 period, considering Ray's age, experience, and limited resources.

For the 1957-78 period Ray's role and capabilities as a farmer-rancher are established; however, its proof refers to other contracts and the arm's length business relationships of Ray and Ben which discredit plaintiff's claims. Ray and Ben first had a continuous farming partnership until 1968 which included all farming operations, income tax returns, mutual credit arrangements, and both living and working on the farms owned by Ray, Ben, and Cora. This partnership was mutually terminated in writing; Ben and Cora made gifts to Ray. Their next 10-year farm relationship was that of landlord and tenant. Ben's will explained Ray's disinheritance.

Plaintiff's evidence does not meet the standard of clear, satisfactory, and unequivocal proof of the claimed contract and its terms, consideration, partial performance, and the parties' assent thereto, either expesss or implied. Defendants were entitled to judgment on their motion made at the close of plaintiff's case in chief.

It is not necessary to consider plaintiff's other assigned errors.

The briefs do not address the issue of a joint tenant (Cora) not being a contracting party.

The trial court properly dismissed the plaintiff's petition.

AFFIRMED.

GLORIA NOAH, APPELLANT, V. CREIGHTON OMAHA REGIONAL HEALTH CARE CORPORATION AND TRAVELERS INSURANCE COMPANY, APPELLEES.

328 N.W.2d 203

Filed December 23, 1982. No. 82-024.

Workmen's Compensation: Appeal and Error. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. The decision of the compensation court after rehearing must be considered in the light most favorable to the successful party, and every controverted fact must be decided in its favor.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

James S. Jansen, for appellant.

Patrick B. Donahue of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and BRODKEY, J., Retired.

CLINTON, J.

This is a workmen's compensation case in which the plaintiff received an award from the one-man Workmen's Compensation Court. Upon rehearing before three members of the court the plaintiff's claim was dismissed.

The accidental injury is alleged to have occurred while the plaintiff was employed as a medical records clerk by the defendant hospital. A detailed review of the conflicting evidence will not serve any useful purpose. We will therefore summarize rather briefly. The injury is alleged to have occurred about June 24, 1980, while the plaintiff was doing

some filing work either while getting down from the stool, walking away from the stool, or as a result of a twisting motion. The plaintiff had a history of prior back problems with previous employers and for some of these complaints she drew workmen's compensation benefits. In this case her principal attending physician was of the opinion that she suffered from a chronic mechanical back problem which preexisted her employment with the defendant; that before the incident of June 24, 1980, she had a 5 percent disability and after the incident she had the same percentage of disability, and that it was not attributable to anything that occurred on June 24, 1980. A second physician, who had little or no knowledge of her prior history, attributed her pain to what occurred on June 24, 1980.

The governing principle is that the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. The decision of the compensation court after rehearing must be considered in the light most favorable to the successful party, and every controverted fact must be decided in its favor. Neb. Rev. Stat. § 48-185 (Reissue 1978); *Davis v. Western Electric*, 210 Neb. 771, 317 N.W.2d 68 (1982).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERNEST E. HOLLAND, APPELLANT.

328 N.W.2d 205

Filed December 23, 1982. No. 82-035.

1. **Criminal Law: Evidence.** The owner of chattels may testify as to their value in a criminal case.
2. **Evidence: Appeal and Error.** The defendant may not predicate error on the admission of evidence to which no objection was made when adduced.

3. **Verdicts: Appeal and Error.** This court will not interfere with a jury verdict of guilty based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger, for appellant.

Paul L. Douglas, Attorney General, and Mark D. Starr, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

CAPORALE, J.

Defendant-appellant, Ernest E. Holland, was adjudged guilty, pursuant to a jury verdict, of theft of property valued at over $300 but less than $1,000. He was sentenced to a term of not less than 20 months nor more than 5 years in the Nebraska Penal Complex, and was granted credit for 100 days' prior incarceration time.

In this appeal defendant contends that the evidence was insufficient as a matter of law to sustain the conviction, in that proof of the value of the items taken was inadequate. We disagree; accordingly, the action of the trial court is affirmed.

The items taken were an amateur radio, a citizens band radio, and a Swiss army knife, which the owner acquired by gift in two instances and purchase in the remaining instance. The owner testified as to his opinion of the value of the items on the date of the theft. Defendant argues this evidence is insufficient as a matter of law to establish the element of value inasmuch as there was no testimony as to the purchase price of the items.

It has long been the rule in this jurisdiction that the owner of chattels may testify as to their value in a criminal case. In *State v. Weik*, 206 Neb. 217, 292

N.W.2d 289 (1980), it appears neither the owner nor the other valuation witness testified as to the purchase price of the stolen items, but the evidence was nonetheless found to be sufficient. It is true that in an earlier case, *State v. Rush*, 202 Neb. 425, 275 N.W.2d 834 (1979), evidence as to the purchase price was present. It is also true, as defendant points out, that in *State v. Stowell*, 190 Neb. 615, 211 N.W.2d 130 (1973), we found the evidence insufficient where the owner had acquired the stolen television set by gift and there was no evidence of the purchase price. However, in *Stowell* the owner demonstrated he had no real opinion as to its value at the time of the theft. Such was not the situation in the case at hand.

From these cases, without the citation of any other authority, defendant asks us to adopt a rule which would require evidence of the purchase price of a stolen item in every case of theft. This we refuse to do, as there may well be instances where such evidence is a necessary part of the foundation to be laid for an owner's opinion of value and other instances where it simply is not.

This analysis brings us to the second reason defendant's argument must fail. Even if foundation for the owner's opinion of value in this case were lacking, no objection to the receipt of that evidence was made. The defendant may not predicate error on the admission of evidence to which no objection was made when adduced. *State v. Gore*, 212 Neb. 287, 322 N.W.2d 438 (1982); *State v. Lingle*, 209 Neb. 492, 308 N.W.2d 531 (1981).

In view of the record before us and the verdict of the jury, it is obvious that the jury chose to believe the valuation evidence received. It is not our province to second-guess the jury. This court will not interfere with a jury verdict of guilty based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilty beyond a

reasonable doubt. *State v. Brown*, *ante* p. 68, 327 N.W.2d 107 (1982); *State v. True*, 210 Neb. 701, 316 N.W.2d 623 (1982). The evidence in the record before us is more than sufficient, when believed by the jury, to support the conviction herein.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GERALD J. DAVISON, APPELLANT.

328 N.W.2d 206

Filed December 23, 1982. No. 82-223.

1. **Ordinances: Statutes: Constitutional Law.** Ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established.
2. **Highways: Motor Carriers: Police Powers.** As a general rule, under its police power, a state may, in the interest of safety and public welfare, restrict the weight of vehicles using its highways by reasonable and nondiscriminatory regulation.
3. **Ordinances: Motor Carriers.** Local regulation which may affect interstate commerce is constitutional only if the local interest is substantial and the police power is reasonably exercised, the burden on interstate commerce is slight, and the regulation does not discriminate against nonresidents or interstate commerce.
4. **Constitutional Law.** A classification having some reasonable basis does not offend against the equal protection clause of the fourteenth amendment merely because it is not made with mathematical nicety or because in practice it results in some inequality. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Appeal from the District Court for Saunders County: BRYCE BARTU, Judge. Affirmed.

Haessler, Sullivan & Inbody, for appellant.

Charles H. Wagner of Edstrom, Bromm, Lindahl & Wagner, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

McCown, J.

This is an appeal from a judgment of the District Court affirming the county court conviction of the defendant for operation of a truck upon a city street in Ashland, Nebraska, in violation of a weight limit ordinance of the city of Ashland. The only issue on appeal is the constitutionality of the city ordinance.

On March 20, 1981, the defendant Davison was stopped by police while driving a semitrailer truck on Furnas Street in Ashland, Nebraska. Davison was employed by, and driving a truck owned by, a trucking company which had its headquarters on a north-south highway a short distance west of the Ashland city limits. The company operated four trucks, each licensed for 80,000 pounds in all states west of the Missouri River.

Davison was issued a summons and citation for violation of a city ordinance and resolution which provided: "It shall be unlawful to operate upon any street or alley in the City of Ashland, Nebraska, any truck, truck-tractor, semitrailer, or trailer or combination thereof having a gross weight of more than five (5) tons, except that said vehicles may exceed said limitations if they are being used to deliver goods and/or items to and from residences and/or business in the City of Ashland, Nebraska."

Signs were posted at appropriate locations informing drivers of the weight limit on city streets.

At trial the parties stipulated that Davison had been stopped within the city limits and that the truck was in excess of 5 tons. The defense under the not guilty plea was that the ordinance was unconstitutional.

The mayor of the city testified that before the weight limit was established in 1976 frequent and heavy truck traffic had previously caused substantial damage on certain city streets. He testified that the ordinance was passed to increase safety for the residents and to preserve the roadways for as long as practicable.

The county highway superintendent testified that 6-inch unreinforced concrete roadways such as the street involved will deteriorate under heavy and sustained traffic and that since the construction of the street in 1974 street specifications have changed and now require a thicker roadway for new streets, and the cost to replace the street under present specifications would be approximately $300,000. There was also evidence that not only weight but the frequency of heavily weighted traffic contributes directly to rapid deterioration of the roadway.

Davison's employer testified that he operates four trucks and that his trucks return to headquarters twice a week in wintertime and every day in the summertime, but he did not indicate from which direction the trucks came and went, nor with what frequency any of them would use the city streets. He testified that the alternate legal route to reach a point north of Ashland from his headquarters involves an increase of 4½ miles going one way and approximately 11 miles returning, the difference being occasioned because the trucks cannot negotiate a difficult turn on the return trip, and that the cost of operating the trucks was approximately 90 cents a mile.

The record also shows that the employer's trucks could travel north from their headquarters without any loss of distance and without traveling on city streets except for the fact that the employer's trucks are overweight for three bridges which are located on that road.

The record also shows that through traffic does not have to take circuitous routes to avoid city streets. State and federal highways skirt the edges of town and are not within the weight limit prohibition.

The county court sitting without a jury found that the ordinance was constitutional and fined the defendant $100. On appeal de novo on the record the District Court affirmed the judgment of the county

court and this appeal followed.

The defendant contends that the ordinance violates the U.S. Constitution and constitutes an unreasonable and discriminatory burden on interstate commerce and on nonresidents of the city.

Ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established. *State v. Austin*, 209 Neb. 174, 306 N.W.2d 861 (1981).

As a general rule, under its police power, a state may, in the interest of safety and public welfare, restrict the weight of vehicles using its highways by reasonable and nondiscriminatory regulation. *State v. Luttrell*, 159 Neb. 641, 68 N.W.2d 332 (1955).

In Nebraska, municipalities have been granted the right to restrict weight limits under Neb. Rev. Stat. § 39,6,189 (Reissue 1978), which provides in part: "Local authorities may also, by ordinance or resolution, prohibit the operation of trucks or other commercial vehicles, or impose limitations as to the weight thereof on designated highways, which prohibitions and limitations shall be designated by appropriate signs placed on such highways."

Local regulation which may affect interstate commerce is constitutional only if the local interest is substantial and the police power is reasonably exercised, the burden on interstate commerce is slight, and the regulation does not discriminate against nonresidents or interstate commerce. *Head v. New Mexico Board*, 374 U.S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963); *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 79 S. Ct. 962, 3 L. Ed. 2d 1003 (1959).

The record in the present case establishes that the vehicular weight limitations of the challenged ordinance are reasonably calculated to achieve the legitimate and substantial interests of the city of Ashland in promoting public safety and preserving public property. The burden on interstate commerce is at most slight, if not virtually nonexistent.

Defendant's argument that trucks headquartered

at the location here must drive additional miles when traveling north is unpersuasive. Local weight limit restrictions have been upheld even though the vehicles involved were required to take an alternative route three times as long as the original route. See, *Carpentersville Ready Mix v. Carpentersville*, 39 Ill. App. 3d 840, 350 N.E.2d 508 (1976); *McCammon v. City of Redwood City*, 149 Cal. App. 2d 421, 308 P.2d 831 (1957).

Finally, the defendant argues that the ordinance is discriminatory because it allows trucks over 5 tons to use the streets if delivering goods and items to or from Ashland.

The ordinance makes no distinction between local or foreign trucks but operates exactly the same as to both. On the evidence in the record the ordinance does not discriminate against interstate commerce in general since through traffic does not have to take any alternative route to avoid the city streets. The alleged "discrimination" has a rational basis and establishes a reasonable classification. A classification having some reasonable basis does not offend against the equal protection clause of the fourteenth amendment merely because it is not made with mathematical nicety or because in practice it results in some inequality. When the classification in such a law is called into question, if any stated facts reasonably can be conceived that can sustain it, the existence of that state of facts at the time the law was enacted must be assumed. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369 (1911). For cases upholding vehicular weight limits which exempt certain classes of vehicles from the ordinance or statute, see, *Railway Express v. New York*, 336 U.S. 106, 69 S. Ct. 463, 93 L. Ed. 533 (1949); *Sproles v. Binford*, 286 U.S. 374, 52 S. Ct. 581, 76 L. Ed. 1167 (1932); and *Allison v. Med-*

lock, 224 Ga. 37, 159 S.E.2d 384 (1968).

The ordinance involved in the present case represents a reasonable attempt to achieve a substantial and legitimate local interest of the city of Ashland. It imposes a very slight burden, if any, on interstate commerce, and it does not discriminate against nonresidents or interstate commerce. The challenged ordinance is therefore constitutional.

The judgment of the District Court is affirmed.

AFFIRMED.

ALFRED E. MITTELSTADT, APPELLANT, V. DONDRU D. ROUZER, MARION TYE, AND B. J. MCADAMS, INC., A CORPORATION, APPELLEES.

KATHALEEN M. MITTELSTADT, APPELLANT, V. DONDRU D. ROUZER, MARION TYE, AND B. J. MCADAMS, INC., A CORPORATION, APPELLEES.

328 N.W.2d 467

Filed December 23, 1982. Nos. 82-348, 82-349.

1. **Corporations: Venue: Service of Process.** Under the venue statutes, a nonresident defendant corporation "may be found" in any county within the state in which proper service can be had upon its agent.
2. **Corporations: Jurisdiction.** Jurisdiction over a foreign corporation may be exercised by consent of such corporation.
3. **Corporations: Service of Process: Jurisdiction.** By designating an agent upon whom process may be served within this state, a defendant has consented to the jurisdiction in personam by the proper court.
4. **Corporations: Service of Process.** The validity of service under the Motor Carrier Act, 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. § 10330(b) (Supp. IV 1980)), is not limited to causes of action arising out of commerce transacted by a foreign corporation within the state because the act deals with jurisdiction of the person.
5. **Corporations: Service of Process: Jurisdiction.** By appointing a resident agent for service as required by the Motor Carrier Act, 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. § 10330(b) (Supp. IV 1980)), a nonresident corporation has consented to jurisdiction within this state at least as to any cause of action arising out of its activities as a motor carrier in interstate commerce.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded.

Kenneth Cobb of Cobb & Rehm, P.C., for appellants.

William E. Langdon of Cline, Williams, Wright, Johnson & Oldfather, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

Plaintiffs in these cases have appealed from orders of the District Court dismissing their petitions following the sustaining of the special appearances filed by the defendant B. J. McAdams, Inc.

The plaintiffs, Alfred E. and Kathaleen M. Mittelstadt, are both residents of Nebraska and brought these actions against the defendant McAdams and others for damages arising out of an automobile accident occurring on July 7, 1979, near Flagstaff, Arizona. The petitions alleged that the driver of the truck causing the accident was at the time an employee of and acting within the scope of her employment for the defendant McAdams. Service was obtained upon McAdams, an Arkansas corporation, by summons served on its resident agent living in Omaha, Nebraska. This agent had been appointed to conform to the requirements of the Motor Carrier Act, 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. § 10330(b) (Supp. IV 1980)). That particular section provides in part as follows: "A motor carrier . . . providing transportation subject to the jurisdiction of the [Interstate Commerce] Commission . . . shall designate an agent in each State in which it operates . . . on whom process issued by a court with subject matter jurisdiction may be served in an action brought against that carrier . . . ."

The record discloses that McAdams' trucks travel

through Nebraska as part of its interstate service, logging something less than 3 percent of its total miles within the state. There was no evidence that McAdams owns property in Nebraska, has customers in Nebraska, or has any contacts within the state other than the use of the interstate highway system.

The special appearance was sustained on the ground that the State of Nebraska had no jurisdiction over the defendant. The plaintiffs argue that such jurisdiction vested by reason of Neb. Rev. Stat. § 25-511 (Reissue 1979), § 21-20,114 (Reissue 1977), and §§ 25-536 and 25-408 (Reissue 1979).

Section 25-511 simply defines a method of serving process. It provides in part that "A summons against a corporation may be served . . . by a copy personally served upon the registered agent of the corporation . . . ." Section 21-20,114 states in part that "The registered agent so appointed by a foreign corporation authorized to transact business in this state shall be an agent . . . upon whom any process . . . may be served." However, because McAdams only transacted business in interstate commerce within the state, it was not required to appoint such registered agent provided by Nebraska law. See Neb. Rev. Stat. §§ 21-20,105 and 21-20,112 (Reissue 1977).

The plaintiffs' assertion that the courts of this state may exercise personal jurisdiction over McAdams under the provisions of § 25-536, the so-called "long arm statute," is without merit. The cause of action neither arose from the transaction of business by the defendant within the state, nor was the injury caused by act or omission occurring within the state or outside this state while the defendant regularly did or solicited business within the state, as required by that section.

Also relied upon by the plaintiffs as vesting jurisdiction over the defendant is § 25-408, which provides that an action such as the present one may be brought against a foreign corporation in any county

"where said defendant may be found." Although this is but a venue statute, it suggests the answer to our inquiry.

A defendant "may be found" in any county in which proper service can be had upon its agent. *Juckett v. Brennaman,* 99 Neb. 755, 157 N.W. 925 (1916). Jurisdiction over a foreign corporation may be exercised by consent of such corporation. *Brown v. Globe Laboratories, Inc.*, 165 Neb. 138, 84 N.W.2d 151 (1957). By designating an agent upon whom process may be served within this state, a defendant has consented to the jurisdiction in personam by the proper court. *Esperti v. Cardinale Trucking Corp.*, 263 A.D. 46, 31 N.Y.S.2d 253 (1941). The validity of service under the Motor Carrier Act, 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. §10330(b) (Supp. IV 1980)), is not limited to causes of action arising out of commerce transacted by a foreign corporation within the state because the act deals with jurisdiction of the person. *Esperti, supra.*

In *Normann v. Burnham's Van Service,* 73 So. 2d 640 (La. App. 1954), appears the following language at 646: "There is no question that if plaintiff had caused citation in the suit to be served on the agent designated by appellant [defendant] pursuant to the Federal Act, the action could have been conducted as one in personam, as appellant would have been effectively brought into court by virtue of such citation." See, also, *Sansbury v. Schwartz*, 41 F. Supp. 302 (D.D.C. 1941); *Shapiro v. Southeastern Greyhound Lines*, 155 F.2d 135 (6th Cir. 1946).

However, the defendant has cited to us three cases which it claims are determinative of the issue in its favor: *Clark v. Babbitt Brothers, Inc.*, 260 S.C. 378, 196 S.E.2d 120 (1973); *King v. Motor Lines*, 219 N.C. 223, 13 S.E.2d 233 (1941); and *Davies v. Mahanes*, 88 F. Supp. 550 (D. Md. 1949). We believe that the cases are all distinguishable.

The facts in *Clark* were remarkably similar to those of the instant case. A resident of South Caro-

lina brought suit in a court of that state against a Wisconsin corporation for damages sustained by reason of an accident in Kentucky. Service was had on the defendant's resident agent appointed under the terms of the Motor Carrier Act. In affirming the action of the trial court, which had dismissed the service, the South Carolina court pointed out that the cause of action arose some 2 months *after* the date when the defendant ceased maintaining an agent for the transaction of business, or owning any property or transacting any business within the State of South Carolina.

King involved a situation wherein the residence of both parties and the accident site were all located in Tennessee. The North Carolina court refused to recognize service upon the resident agent appointed under the provisions of the Motor Carrier Act. In doing so, it relied on *Old Wayne Life Ass'n v. McDonough*, 204 U.S. 8, 27 S. Ct. 236, 51 L. Ed. 345 (1907), as "authority for the position that such attempted service will not suffice on a cause of action arising in another jurisdiction." *King*, *supra* at 224, 13 S.E.2d at 234. However, *Old Wayne* did not involve service upon a named resident agent, nor did the cause of action arise out of the interstate operation of a motor carrier. Rather, it was concerned with a corporation which was a nonresident of the forum state and an action on a contract executed in the state of residence of such corporation. Jurisdiction was attempted by service of summons on the insurance commissioner of the forum state as the implied agent for service, the foreign corporation having failed to comply with the laws of that state as to the appointment of a resident agent. The Supreme Court of the United States concluded that "such assent [to service] cannot properly be implied where it affirmatively appears . . . that the business was not transacted in Pennsylvania." *Old Wayne*, 204 U.S. at 22.

Although decided on another ground, the following

language touches on the question of personal jurisdiction: "So interpreted section 321(c) seems to have no proper application to this case *where neither party* to the case *is a citizen or resident of this District*, where the tort sued for did not occur and where the defendant's truck at the time was not engaged in interstate transportation." (Emphasis supplied.) *Davies*, *supra* at 551.

The above three cases are not determinative of this issue. More nearly in point, and a case which contains a most exhaustive review of the authorities in this area of the law, is *State ex rel. v. Latourette*, 186 Or. 84, 205 P.2d 849 (1949). Most, if not all, of the cases cited in this opinion are examined in *Latourette*. This was a proceeding in mandamus to test the validity of service upon a resident agent appointed in Oregon under the provisions of the Motor Carrier Act. The basic action was one in tort brought in the Oregon court by a Washington resident against a Washington carrier and arising out of an accident occurring in Washington. The effect of the Oregon court's holding was that service was valid. The opinion stated: "That question can be stated this way: Does 49 U.S.C.A., § 321(c), mean that one who possesses a cause of action against an interstate motor carrier may sue the carrier in any state in which it had appointed a statutory agent, or does it mean that the suit must be filed in one of the following states: (1) where the cause of action arose; (2) where the plaintiff resides; or (3) where the defendant resides; and if so, which one. . . . The language of 49 U.S.C.A., § 321(c), is sweeping and is free from qualifying passages. Nowhere does it manifest a preference for the state in which a prospective plaintiff dwells, nor for one in which the defendant lives, nor for the one in which the cause of action arose. It treats all states in which a process agent has been appointed with equal impartiality. We have no right to subtract anything from § 321(c) nor to insert prefer-

ences in it which the lawmaker omitted." *Latourette, supra* at 102, 205 P.2d at 857.

We hold that by appointing a resident agent for service as required by 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. § 10330(b) (Supp. IV 1980)) a nonresident corporation has consented to jurisdiction within this state at least as to any cause of action arising out of its activities as a motor carrier in interstate commerce. Whether in this instance venue was properly laid in the District Court for Lancaster County, as provided for in § 25-408, is not before us at this time.

The judgment of the District Court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

WHITE, J., concurs in the result.

CHARLES SMITH, APPELLEE, V. FETTIN ROOFING CO., INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS.

328 N.W.2d 470

Filed December 30, 1982. No. 43755.

1. **Corporations: Stock.** Generally, "book value" of the stock in a corporation means the figure obtained by dividing the difference between assets and liabilities by the number of outstanding shares of stock.
2. **Prejudgment Interest.** Generally, a party is not entitled to prejudgment interest where the amount due is not readily determinable by computation from data without reliance on opinion or discretion.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed as modified.

Edward F. Carter, Jr., and Barney, Carter & Johnson, P.C., for appellants.

John McArthur and A. James McArthur, for appellee.

BOSLAUGH, MCCOWN, and CLINTON, JJ., and BRODKEY, J., Retired, and DEBACKER, D.J.

PER CURIAM.

This case arises out of a controversy concerning a written contract between the plaintiff, Charles Smith, and the defendant, Fettin Roofing Co., Inc. The contract provided for the repurchase of capital stock of the corporation by the corporation upon the termination of the employment of the plaintiff by the defendant.

The contract, termed an "Employment Agreement," was signed on July 28, 1974. It was executed on behalf of the corporation by Ralph Greb and Marvin G. Hahn, the sole stockholders of the corporation at that time. The contract provided generally that the plaintiff would be employed by the defendant as a roofer. It further provided: "6. During the term of this agreement Employee shall have the option to purchase the same amount of stock in Company as the present two owners own at the time Employee exercises such option priced at the book value at the time the option is exercised. At the time Employee exercises such option the Company will, at its own expense and within forty-five (45) days provide an audit of Company's books to determine the book value of its stock. That if Employee leaves Company, Company will repurchase said stock owned by Employee for the book value at the date of the termination of his employment. At such time Company will provide an audit to determine the book value of such stock."

Approximately 6 months after the date of the employment contract the plaintiff decided to purchase stock in the corporation. It was agreed between the plaintiff, Greb, and Hahn that the plaintiff would purchase 1,045 shares at $14.40 per share at that time. The plaintiff paid $14,000 in cash and was given a credit of $1,048 by the corporation, which was supposed to represent a one-third share of the

profits for 4 months. A memorandum signed by Greb and Hahn at that time, dated "2-10-75," provided: "Freeze Shares @ 14.40 for Smitty to by [sic] 455 Shares at the end of 1977 from His profits out of Company or from his on persenal [sic] Money." The plaintiff purchased the remaining 455 shares of stock in 1976 and paid $6,480 in cash to the corporation. The plaintiff, Greb, and Hahn then owned equal amounts of stock in the defendant corporation.

In 1976 Hahn withdrew from the corporation. Hahn's stock was purchased by the corporation for $44,295 and is now held as treasury stock.

In 1977 a controversy developed between Greb and the plaintiff over the plaintiff's work performance on some of the jobs. On April 13, 1977, Greb, as president of the corporation, wrote to the plaintiff requesting immediate termination of his employment and the keys to all of the premises and equipment of the company. Three or four days later, the plaintiff wrote a note to Greb stating: "Ralph, here is your keys. About your letter I going to go through with it. Smitty."

The principal issue in this case is the determination of the "book value" of the plaintiff's stock in the corporation at the time his employment was terminated. The contract provided that the defendant at such time "will provide an audit to determine the book value of such stock."

There is no substantial dispute between the parties as to the meaning of the term "book value." Generally, "book value" of the stock in a corporation means the figure obtained by dividing the difference between assets and liabilities by the number of outstanding shares of stock. See, 18 Am. Jur. 2d *Corporations* § 219 (1965); Annot., 51 A.L.R.2d 606 (1957). There is, however, a substantial dispute in this case as to how it should be computed.

It is undisputed that the defendant did not provide an audit to determine the book value of the plain-

tiff's stock. The plaintiff was provided with a balance sheet prepared by Clarence C. Knosp. Knosp was an employee of American Stores Packing Company, but also practiced public accounting. He had done accounting work for the defendant since 1971 or 1972.

The balance sheet prepared by Knosp showed the book value of the stockholders' equity to be $49,691.69 as of April 30, 1977.

The plaintiff employed Gerald S. Grant, a certified public accountant, to examine the records of the defendant and determine the book value of the stock as of April 30, 1977. Grant testified that his examination of the records of the defendant was in the nature of a "limited examination" rather than an audit because there were certain items, such as inventory, that could not be independently verified by him as of April 30, 1977. A bank reconciliation was made, and accounts payable and accounts receivable were verified. Grant was unable to determine original cost of equipment or satisfy himself as to the original issuance of capital stock. The examination which he made, to the extent it was made, was made in accordance with generally accepted auditing standards.

The balance sheet prepared by Grant showed the book value of the stockholders' equity as of April 30, 1977, to be $100,972.

The difference between the values established by Knosp and Grant is over $50,000. It is impossible to reconcile all of the differences between the two balance sheets, but the major differences are explained in the testimony.

Grant discovered an error in accounts receivable that defendant concedes increased assets by approximately $11,400. Grant included $7,267 for work in progress. Knosp claimed there were no unbilled accounts receivable. Grant included $37,268 for "Income Taxes Refundable," due to the net operating loss of the defendant amounting to approxi-

mately $97,000 for the first 4 months of 1977. Grant explained that if the books were closed as of April 30, 1977, such an item should be included to correctly reflect the income tax liability status of the corporation as of that date. Since the business of the defendant is seasonal in nature, the income received in the profitable months during the balance of the year offset the loss during the first 4 months and resulted in a small profit being realized for the entire year. The plaintiff, however, was entitled to the benefit of the potential income tax credit as of April 30, 1977, because the operating loss was deducted from surplus or undistributed profits accumulated in prior years in computing book value.

The trial court found that the book value of the plaintiff's stock was $51,073.34 and that the plaintiff should recover prejudgment interest on that amount from April 30, 1977. In addition to that amount, the trial court found that the plaintiff should recover $4,011.85 for accounting expense.

Upon review de novo we determine that the book value of the plaintiff's stock as of April 30, 1977, was $50,486, and the plaintiff is entitled to recover that amount from the defendant. We find that the plaintiff is not entitled to prejudgment interest because the amount due the plaintiff was not "determined or readily determinable by computation." It was not liquidated because the amount due could not be determined from data without reliance upon opinion or discretion. See *Estate of Ruwe v. Ruwe,* 190 Neb. 663, 211 N.W.2d 610 (1973).

The plaintiff is entitled to recover the $4,011.85 accounting expense he incurred because it was the obligation of the defendant to furnish the audit. The defendant is not entitled to a credit for one-half of the expense of the audit, as claimed by the defendant, because it was the obligation of the company to furnish the audit.

The judgment of the District Court is modified to provide that the plaintiff shall recover $50,486 with-

out prejudgment interest as the book value of his stock; and as so modified it is affirmed.

AFFIRMED AS MODIFIED.

CLINTON, J., not participating.

RUSSELL L. KOERNER, APPELLANT, V. ROCHELLE A. PERRELLA, APPELLEE.

328 N.W.2d 473

Filed December 30, 1982. No. 44046.

Evidence: Appeal and Error. Where evidence is conflicting or where reasonable minds may draw different inferences or conclusions from the evidence, it is within the province of the jury to decide the issues of fact, and the Supreme Court will not set aside or direct a verdict in such a situation.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

William L. Gilmore and Debra K. Lyford of McArthur, Lamb, Lyford, Gilmore & Janssen, for appellant.

Patrick W. Healey of Healey, Brown, Wieland, Kluender, McCord & Atwood, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MURPHY and WHITEHEAD, D. JJ.

WHITEHEAD, D.J.

This is an action for damages and personal injuries resulting from an automobile-motorcycle collision. Plaintiff Koerner, in his petition, alleges that the negligence of the defendant was the proximate cause of the accident and resulting injury. Defendant Perrella, in her answer, alleged that the proximate cause of the collision and the resulting injuries was the negligence of the plaintiff. The matter was tried to a jury and the jury returned a verdict in favor of the defendant Perrella. The plaintiff has appealed.

The collision involved in this case occurred on Cotner Boulevard near the intersection of 64th Street and Cotner Boulevard. On August 7, 1979, at approximately 4:15 p.m., the defendant was operating her automobile, a green 1975 AMC Gremlin, southbound on Cotner Boulevard, heading toward her apartment at 6425 Dudley Street. The plaintiff was traveling in the same direction, with the defendant's automobile in front of him while he was riding on his motorcycle. Defendant testified it was her intention to pull in a driveway located on the west side of Cotner between Orchard and Dudley Streets which led to a parking lot immediately adjacent to her apartment.

The parties proceeded along at a point where the southbound lane begins to widen to provide for a left turn lane onto Dudley Street. The plaintiff testified that the defendant's automobile appeared to move to the left. The defendant then turned her automobile sharply, making a right-hand turn into the driveway. The plaintiff, who was in the southbound lane, collided with the defendant's vehicle, the plaintiff's motorcycle colliding with the right passenger door at a point near the hinges. The plaintiff testified that there were no turn signals or any warning; the defendant testified that prior to the accident she had slowed to about 10 miles per hour, that her turn signals were working, and that she automatically uses her turn signals.

Plaintiff testified that he first saw the defendant's car as he was proceeding southwest on Cotner when it was in front of the Derby station south of Dudley. He said that at that time he was going 30 to 35 miles per hour and the Gremlin was going slowly. Plaintiff then observed a friend in the Derby station on the left side of the street. He acknowledged that he took at least a few seconds to check out his friend in the Derby station. He believed he had honked, and when he had looked back the defendant's auto was in the left lane and he was approximately 15 or 20 feet

behind it, was unable to stop, and collided with defendant's auto. The matter was submitted to a jury and the jury returned a verdict for the defendant. The plaintiff appeals. We affirm.

The plaintiff raises a number of grounds for appeal in his motion for new trial and the assignments of error cited in his brief, which may be condensed to three grounds: (1) That the trial court erred in instructing the jury on the comparative negligence; (2) That the trial court erred in failing to instruct the jury that the defendant was negligent as a matter of law; and (3) That the weight and sufficiency of the evidence was clearly contrary to the verdict received.

The plaintiff contends that the court should not have submitted the issue of contributory negligence to the jury. The issue was well pled by the defendant in this matter, and this court has stated repeatedly, in the interpretation of Neb. Rev. Stat. § 25-1151 (Reissue 1979), that " 'It should be noted here that the final provision of the comparative negligence statute requires that "all questions of negligence and contributory negligence shall be for the jury." *While that language obviously does not affect the court's right to decide a case as a matter of law, it does emphasize the fact that the determination of questions of negligence and contributory negligence and the comparative measuring of them are basically factual issues which are generally for determination by the jury.'* (Emphasis supplied.)" (Emphasis supplied.) *C. C. Natvig's Sons, Inc. v. Summers,* 198 Neb. 741, 747-48, 255 N.W.2d 272, 277 (1977).

In the present case, even assuming that the defendant was guilty of negligence as a matter of law for failing to signal her right-hand turn, the degree of negligence as compared to the possible negligence on the part of the plaintiff remains in dispute. There was testimony as to the plaintiff's lack of lookout and conflicting testimony as to whether or not the

defendant had signaled, and, therefore, the issue was proper for submission to the jury. It should be noted that prior to submission of the matter the instructions were submitted to all counsel for comment, and each individual instruction was reviewed by counsel for objection. No objection was reflected in the record as to alleged erroneous instructions. The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. *Beveridge v. State,* 183 Neb. 406, 160 N.W.2d 229 (1968); *Libbey-Owens Ford Glass Co. v. L & M Paper Co.,* 189 Neb. 792, 205 N.W.2d 523 (1973).

Another contention of the plaintiff is that the weight and sufficiency of the evidence was clearly contrary to the verdict received. This court has on numerous occasions stated that where evidence is conflicting or where reasonable minds may draw different inferences or conclusions from the evidence, it is within the province of the jury to decide the issues of fact and the Supreme Court will not set aside or direct a verdict in such a situation. See, *Mustard v. St. Paul Fire & Marine Ins. Co.,* 183 Neb. 15, 157 N.W.2d 865 (1968); *Libbey-Owens Ford Glass Co. v. L & M Paper Co., supra.*

In the case at bar the jury returned its verdict in favor of the defendant and there was competent evidence to support that verdict. The verdict of the jury will not be disturbed unless it is clearly wrong. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

Cite as 213 Neb. 193

WESLEY PEARCE, APPELLEE, V. ELIC CORPORATION, A NEBRASKA CORPORATION, APPELLANT.

329 N.W.2d 74

Filed December 30, 1982. No. 44460.

1. **Contracts: Waiver: Proof.** A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive.
2. **Contracts: Waiver.** Conditions precedent in a contract may be waived.
3. _____: _____. A provision in a written contract that a waiver of the conditions and terms of the agreement must be in writing may be waived by acts or conduct.
4. _____: _____. The general rule is that the assertion of the invalidity of a contract is nullified by the subsequent acceptance of benefits growing out of the contract claimed to have been breached.
5. _____: _____. Where a contracting party, with knowledge of a breach by the other party, receives money in the performance of the contract, he will be held to have waived the breach.
6. **Contracts: Parol Agreement.** A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration; and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof.
7. **Contracts: Parol Evidence.** The parol evidence rule relates only to agreements made prior to or contemporaneous with the written agreement and does not apply to parol agreements made after a written agreement.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Jeffrey A. Silver, for appellant.

Sutter & Olson, for appellee.

BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and BRODKEY, J., Retired.

BRODKEY, J., Retired.

Defendant below, ELIC Corporation (hereinafter referred to as ELIC), has appealed to this court from a judgment entered against it by the District Court for Lancaster County, Nebraska, in an action

brought against the defendant by the plaintiff, Wesley Pearce, to recover certain "overwrite" commissions alleged to be due him by defendant. The case was tried to a jury, which returned a verdict in favor of Pearce in the amount of $7,832.57, and which also returned a verdict in favor of Pearce and against ELIC on ELIC's cross-petition. The trial judge subsequently reduced the judgment to $7,174, and this appeal followed. We affirm.

It appears from the record that plaintiff was engaged as a general agent for D.I.S. Corporation (hereinafter referred to as D.I.S.) under an agreement dated April 1, 1977, he having been associated prior to that time with that corporation since 1970. D.I.S. at that time was engaged in the marketing of credit life and credit accident and health insurance programs for various insurance companies, and D.I.S. received a commission based on premiums received from such insurance companies. Under the agreement of April 1, 1977, Pearce was engaged by D.I.S. to solicit participants in the company's insurance programs; to provide advisory services in connection with the operation of the company's insurance programs; to distribute materials and printed supplies for the conduct of the company's insurance programs; and to make reports and receive and remit funds to the company collected in connection with the company's insurance programs. D.I.S. was a marketing arm for Empire Life Insurance Company and Great Plains Insurance Company. By virtue of an exchange of stock, D.I.S. was merged into a holding company, ELIC, the defendant herein, in 1979, and D.I.S. was dissolved. Mr. Anthony J. Bianchi testified that he was president of ELIC, was also president of Great Plains Insurance Company and Empire Life Insurance Company, which were "all underneath the ELIC umbrella," and was also president of D.I.S.

In the early part of 1978 Great Plains Insurance Company commenced writing a new type of insur-

ance policy of mechanical breakdown insurance which would, in effect, continue the warranty on an automobile and protect it from damage resulting from a mechanical breakdown. This type of insurance was also known and referred to as VIP. At that time D.I.S. was the marketing arm for the insurance for Great Plains.

On July 21, 1978, Pearce and D.I.S. entered into an addendum to the April 1, 1977, agreement previously referred to, which provided, among other things, that in addition to his other commission income Pearce was to receive "an overwrite ('Overwrite') equal to 5% of gross premiums received on Great Plains Insurance Co., Inc. automobile Mechanical Breakdown Program (herein called 'Mechanical Program') written through those automobile dealers delineated in Exhibit 'A' to this Agreement, as of March 1, 1978. However, as a condition precedent to Pearce's receipt of the Overwrite, Pearce must produce net premium (after cancellations) from the sale of credit life insurance and credit accident and health insurance in excess of $67,500.00 per month, which figure is hereinafter referred to as 'Overwrite Quota.' The Overwrite Quota must be satisfied by July 30, 1979 (on business to be reported in August, 1979) in order for Pearce to be eligible for the Overwrite. Company shall deposit the Overwrite in a commercial bank, the choice of which shall be at Company's discretion, as long as said commercial bank is in Omaha, Nebraska. The Overwrite shall be payable to Pearce commencing August 20, 1979, and each month thereafter provided Pearce satisfies the Overwrite Quota. In other words, it is the intention of the parties that if Pearce does not satisfy the Overwrite Quota, he shall not be entitled to receive the Overwrite."

In his petition filed in the District Court for Lancaster County, plaintiff alleged, among other things, that ELIC was the owner of all outstanding stock of D.I.S., a Nebraska corporation, and alleged the

agreement of July 21, 1978, between plaintiff and D.I.S., and the terms thereof; further alleged that subsequent to the execution of the addendum, the defendant waived the condition precedent and paid plaintiff for "overwrite" commissions for 1978 and, further, acknowledged indebtedness to the plaintiff for such commissions for 1979, both orally and in writing, and that the plaintiff had received his 5 percent "overwrite" commissions for 1978 but that the defendant refused to pay plaintiff the overwrite commissions for the calendar year 1979 in the amount of $7,174, although requested to do so; and prayed for judgment against the defendant for that amount.

In its answer filed to plaintiff's petition, defendant generally denied the allegations of such petition and alleged that any payment for "overwrite" commissions for 1978 was an "advance," pending a determination of whether plaintiff would satisfy the "overwrite quota," and further alleged that plaintiff had failed to satisfy the "overwrite quota" for 1979 and was therefore not entitled to receive commissions thereon. Defendant also filed a cross-petition in which it alleged that on May 15, 1979, plaintiff was paid an advance "overwrite" commission of $4,610.52, but that at no time during 1979 did plaintiff satisfy the "overwrite quota"; that defendant had made demand upon the plaintiff for the repayment of such "advances," but that plaintiff had failed and refused to pay said amount; and prayed for judgment against the plaintiff for $4,610.52.

In his reply to defendant's answer, plaintiff denied that the payment of the "overwrite" commission by defendant to plaintiff for 1978 was an "advance," as claimed by the defendant, but that it was paid for services rendered by the plaintiff and said payment constituted a waiver of the condition precedent contained in the addendum, and further alleged that the defendant had acknowledged indebtedness to the plaintiff for the "overwrite" commission for 1979 and had thereby waived the condition precedent.

For answer to defendant's cross-petition plaintiff further denied that the "overwrite" commission in the sum of $4,610.62 was an "advance."

As previously stated, the jury found for the plaintiff both on his petition and also for the plaintiff on defendant's cross-petition.

As stated in defendant's brief on appeal, the issue tried in the court below was whether ELIC waived the condition precedent of the "overwrite quota" and, if so, the amount, if any, of the damages to Pearce resulting therefrom, in addition to whether the amount previously paid to Pearce was an advance and his responsibility to repay said amount. In its assignments of error, defendant contends that the trial court erred in failing to find as a matter of law that the condition precedent in the addendum could not be waived; that the court also erred in allowing testimony to be adduced with reference to negotiations for the purchase of Pearce's insurance agency, in violation of ELIC's motion in limine, which, incidentally, was never formally ruled upon by the court; and also that the court erred in permitting parol evidence with respect to negotiations leading up to the execution of the addendum.

A large number of exhibits were offered and received in evidence in the case. These consisted largely of correspondence between the plaintiff and Anthony J. Bianchi, the president of the various companies previously referred to; and even without the benefit of supporting testimony of the witnesses who testified at the trial, they are most persuasive, are sufficient to support the verdict of the jury and the judgment entered thereon by the trial court, are sufficient to establish a waiver of the condition precedent contained in the addendum with reference to the "overwrite quota," and also are sufficient to establish a subsequent modification of that agreement. We review the pertinent documentary evidence adduced at the trial.

Under date of September 14, 1978, D.I.S. wrote

plaintiff a letter stating: "Enclosed please find a photo copy of the savings account we opened on your behalf. This $2,738.00 represents the V.I.P. Commissions thru August according to the Adendum [sic] dated July 21, 1978.

"If you have any questions on this, please let me know."

Under date of May 15, 1979, Mr. Bianchi wrote plaintiff, on ELIC stationery, as follows: "Wes, here is your VIP commission on all business dated through 12/31/78. This check also includes interest accrued as of this date of 5/15/79.

"*We will still owe you for business production in 1979* and you'll please have to wait til I return to set up the payment.

"Marlene tells me you have been given production sheets through 12/31/78." (Emphasis supplied.)

Next, on July 27, 1979, Mr. Bianchi wrote plaintiff, also on ELIC stationery, stating, among other things, as follows: "So, the bottom line is that effective August 1, we are terminating our Agency Agreement with you. The contract calls for a 90 day notice and so this allows you three months to line up other companies and switch the business." In a letter to plaintiff, dated August 2, 1979, on ELIC stationery, Mr. Bianchi stated, among other things, as follows: "Just for the record, this is to rescind the termination letter dated July 27, 1979. However, as we discussed, it now looks as though we will terminate as of January 1, 1980 with a 90-day notice to you in the latter part of September. . . . *It looks like your dealers have produced VIP this year to June 1st of $60,161 and I will be sending you a check accordingly in the next couple of days.*" (Emphasis supplied.)

Then, on August 17, 1979, Mr. Bianchi wrote a letter to plaintiff, on Empire Life Insurance Company stationery, stating: "*The check to you for the override [sic] on the V.I.P. business will be forthcoming.* We find though that we will need you to sign a new contract or assignment since the old contract is with

D.I.S. . We will be in contact with you when the assignment is ready for your signature.

"Thank you for your patience." (Emphasis supplied.)

In the next letter from Mr. Bianchi to plaintiff, under date of September 27, 1979, also on ELIC stationery, after informing Mr. Pearce that he will give him formal notice of termination on or about October 1, 1979, which will bring about a termination date of January 1, 1980, Bianchi further states: "Let me correct your September 13th letter on one point. *We are not offering to buy your agency as compensation for the termination. We are just offering to buy your agency if it would be a help to you on January 1, 1980.* I understood that you wanted to consider going into another business. If so, we were giving you a possible way to sell your agency." (Emphasis supplied.)

The above language becomes material in connection with the claim of defendant's counsel that during trial the court erred in permitting evidence of the offer to purchase the business as being an offer to compromise or settle a claim. Then, on September 28, 1979, Mr. Bianchi wrote the plaintiff two separate letters, one being on Great Plains Insurance Company stationery and the other on Empire Life Insurance Company stationery, each letter advising Pearce of the company's intention to terminate his agreement with it effective 90 days from that date. Finally, under date of July 14, 1980, a statement was sent to Mr. Pearce, apparently for the first time, for a refund of the moneys previously "advanced" to him as "overwrite" commission, as follows: "Amount due ELIC Corporation as advances on Great Plains Insurance Co., Inc. 'overwrite' commission: $4,610.52."

We also note that in a letter written on D.I.S. stationery, dated July 21, 1978, Mr. Bianchi states, among other things, as follows: "Now, Wes, let me put something down very clearly. You mention that

the 5% overwrite on Mechanical Breakdown is 'due me'. We do not feel this way, we do not feel that we owe you this in any way. We can discuss this at length but our decision is irrevocable."

There is also in the record testimony of Mr. Pearce and his wife to the effect that between Christmas of 1978 and January of 1979, at a social party at the home of Mr. Bianchi, a discussion was had between plaintiff and Mr. Bianchi with reference to ELIC buying out D.I.S., among other matters. We quote verbatim from the record: "And the third conversation that we talked about was the V.I.P., and I said, 'Do you mean things are going to get better? Isn't it about time I started getting paid for the Mechanical Breakdown that we've installed and I've been servicing?' And he said, 'Yes, after the first of the year I'll get ahold of the accounting people and we'll bring the figures up to date and we'll start paying you on a regular basis for the V.I.P.'." Plaintiff also denied in his testimony that Mr. Bianchi had at any time ever told him that such pay was to be an "advance." Plaintiff's testimony was substantiated in every respect by the testimony of his wife, and their testimony was before the jury at the trial. We believe that the evidence in the record was sufficient to justify the jury in concluding that the defendant waived the precondition of the "overwrite quota," both expressly and also by its actions in the payment of the commissions due for 1978 to the plaintiff, which were accepted by him.

The following well-established rules of law are applicable to the facts of the instant case. A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive. *Advance-Rumely Thresher Co. v. Bartzat,* 114 Neb. 35, 206 N.W. 7 (1925); *Alpirn v. H. Epstein & Son,* 138 Neb. 311, 293 N.W. 103

(1940); *Wolf v. Tastee Freez Corp.*, 172 Neb. 430, 109 N.W.2d 733 (1961); 17 Am. Jur. 2d *Contracts* §§ 390 and 392 (1964); 17A C.J.S. *Contracts* §§ 491 and 492(1) (1963). Even conditions precedent in a contract may be waived. 17A C.J.S., *supra* § 491; 17 Am. Jur. 2d, *supra* § 392. Even a provision in a written contract that a waiver of the conditions and terms of the agreement must be in writing may be waived by acts or conduct. 17A C.J.S., *supra* § 492(1); *Bettelheim v. Hagstrom Food Stores*, 113 Cal. App. 2d 873, 249 P.2d 301 (1952); *Boston Insurance Co. v. Barnes*, 120 Ga. App. 585, 171 S.E.2d 626 (1969). The general rule is that the assertion of the invalidity of a contract is nullified by the subsequent acceptance of benefits growing out of the contract claimed to have been breached. *McLeod v. Crawford*, 176 Neb. 513, 126 N.W.2d 663 (1964); *Wegner v. West*, 169 Neb. 546, 100 N.W.2d 542 (1960); *Einot, Inc. v. Einot Sales Co., Inc.*, 154 Neb. 760, 49 N.W.2d 625 (1951). It is also the general rule that where a contracting party, with knowledge of a breach by the other party, receives money in the performance of the contract, he will be held to have waived the breach. 17 Am. Jur. 2d *Contracts* § 396 (1964); 17A C.J.S., *supra* § 492(1). In *Einot, Inc. v. Einot Sales Co., Inc., supra*, we held that where a party to a contract, with full knowledge of the facts and with knowledge of a breach by the other party, receives money in the performance of the contract, the breach will be deemed to have been waived. See, also, *Wegner v. West, supra; Robinson Outdoor Advertising Co. v. Wendelin Baking Co.*, 145 Neb. 112, 15 N.W.2d 388 (1944). A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration; and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof. *W. Wright, Inc. v. Korshoj Corp.*, 197 Neb. 692, 250 N.W.2d 894 (1977); *Jenkins v.*

Watson-Wilson Transp. System, Inc., 183 Neb. 634, 163 N.W.2d 123 (1968); *Bowman v. Wright*, 65 Neb. 661, 91 N.W. 580 (1902).

Under the rules set out above, we believe it is clear that there was a waiver by the defendant of the condition precedent relative to the quota requirement, both expressly and also by conduct, particularly by the reception of the benefits by the defendant and reception of the money paid to it by way of premiums and the commissions paid thereon to the plaintiff for 1978. The waiver amounted to a modification of the previous contract to the extent that the condition was eliminated. No issue is raised in this appeal as to the amount of the commission claimed due by the plaintiff, of which there is evidence in the record; the dispute is as to whether the commissions were payable at all.

We now comment briefly on certain contentions and objections made by defendant in its brief. Defendant contends that the court violated the parol evidence rule in allowing testimony of subsequent oral modifications and waivers of the original agreement. Defendant overlooks the fact that the modification or waiver in this case was made subsequent to the execution of the written agreement. The rule in this state is that the parol evidence rule relates only to agreements made prior to or contemporaneous with the written agreement and does not apply to parol agreements made after a written agreement, which is the situation in this case. See *Jenkins v. Watson-Wilson Transp. System, Inc.*, *supra*.

Defendant also raises as error the action of the court in admitting evidence adduced by Wesley Pearce concerning certain negotiations to purchase his agency. We have previously commented on the evidence relating to the purchase of the agency, and only wish to add that the court sustained defendant's objection to the testimony, ordered it stricken, and told the jury to disregard the statement. The rule is

that when evidence is improperly received, but immediately ordered stricken and the jury is instructed to disregard it, any error is cured. *Danner v. Walters,* 154 Neb. 506, 48 N.W.2d 635 (1951); *Sheridan v. Dudden Implement, Inc.,* 174 Neb. 578, 119 N.W.2d 64 (1962).

Defendant also objected to the admission of exhibit 8 (the letter of September 27, 1979), which it claims contains no relevant evidence necessary to prove Pearce's allegations. We do not agree. Exhibits 8, 9, and 10 were offered and received simultaneously for the purpose of showing the termination history of the plaintiff as to each of the three companies. Proof of the termination date was necessary to establish a cutoff point for the computation of damages. Even if considered as inadmissible, we believe it was harmless, as the verdict was supported by sufficient competent evidence.

We also wish to add that the testimony with reference to the language of the addendum was not offered for the purpose of modifying the agreement, but had reference and pertinence to the subsequent waiver of the terms of the agreement, and as such was properly received.

We have examined all of defendant's assignments of error and believe that they are not meritorious. In view of what we have stated above in this opinion, we conclude that the verdict of the jury, and the judgment entered thereon by the court, was correct and must be affirmed.

AFFIRMED.

ELIZABETH HOLLY, APPELLANT, V. CHARLES MITCHELL, APPELLEE.

328 N.W.2d 750

Filed December 30, 1982. No. 81-598.

1. **Negligence: Evidence.** Where reasonable minds may draw dif-

ferent conclusions and inferences from the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff and the degree thereof when one is compared with the other, the issues must be submitted to the jury.

2. **Pedestrians.** A pedestrian crossing at a regular crosswalk with the right-of-way has a right, until he has notice or knowledge to the contrary, to assume that others will respect his right-of-way.
3. **Pedestrians: Negligence.** Even though a statute grants the right-of-way to a pedestrian crossing a street in the crosswalk, it does not excuse contributory negligence on his part.
4. **Jury Instructions: Appeal and Error.** Instructions should be considered together, and if, when considered as a whole, they correctly state the law, error cannot be predicated thereon.
5. **Verdicts: Appeal and Error.** It is presumed in a jury trial that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Martin A. Cannon and Cynthia G. Irmer of Matthews, Cannon & Riedmann, P.C., for appellant.

Robert D. Mullin of Boland, Mullin & Walsh, for appellee.

BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and BRODKEY, J., Retired.

BRODKEY, J., Retired.

Elizabeth Holly, plaintiff and appellant herein, appeals to this court from the verdict of the jury in favor of the defendant, Charles Mitchell, in an action brought by the plaintiff in the District Court for Douglas County, Nebraska, in which the plaintiff sought damages from the defendant for personal injuries sustained by her as a result of a car-pedestrian accident which occurred on September 26, 1979, at approximately 4:30 p.m., at 15th and Douglas Streets in Omaha, Nebraska. In her petition she alleged that she was a pedestrian in a crosswalk on Douglas Street at the east side of its intersection with 15th Street and that defendant had been northbound on 15th Street and turned onto Douglas

Street while plaintiff was in the crosswalk, striking her and causing serious injuries as set forth in her petition. Plaintiff alleged defendant was negligent in failing to keep a proper lookout, in driving at an excessive rate of speed for the conditions then and there existing, and in failing to yield the right-of-way to plaintiff, who alleges she was in the crosswalk at the time. By way of answer to plaintiff's petition, the defendant admitted the happening of the accident at the time and place in question but denied all other allegations and, further answering, alleged that the sole proximate cause of the accident and resulting injuries was the negligence or contributory negligence of the plaintiff herself, which negligence was more than slight and sufficient in law to bar her recovery. In her reply, plaintiff specifically denied that she was in any manner contributorily negligent. The matter was submitted to the jury on the issues of the negligence of the defendant and the contributory negligence of the plaintiff, and their comparative negligence, and, as stated above, the jury found for the defendant.

In her brief on appeal to this court, plaintiff makes four assignments of error which she contends require that the judgment of the trial court be reversed and that she be given a new trial. Summarizing, these are that (1) the trial court erred in submitting the question of defendant's negligence to the jury because the evidence shows that he was negligent as a matter of law; (2) the trial court erred in submitting the issue of plaintiff's contributory negligence to the jury when there was no evidence of contributory negligence; (3) the trial court erred in submitting to the jury instruction Nos. 13 and 13a, with reference to the relative duties of the parties in regard to keeping a proper lookout, which instructions plaintiff claims were prejudicially harmful to her; and (4) the trial court erred in refusing to give to the jury certain proposed instructions submitted by the plaintiff. We affirm the ver-

dict of the jury and the judgment entered thereon by the trial court.

By way of factual background, it appears from the record in this case that both 15th Street and Douglas Street in the city of Omaha are one-way streets, Douglas Street being one way eastbound and having three lanes or perhaps four in addition to the parking lanes on each side of the street. Fifteenth Street intersects Douglas Street at right angles and is a one-way northbound street, also having multiple lanes but slightly narrower than Douglas Street, which the evidence establishes was approximately 68 feet wide. There are traffic lights at the intersection on the north and east sides of the intersection, with the usual green, yellow, and red lights thereon. There is no traffic light on the south side of the intersection, but there is a "walk" and "don't walk" signal for southbound pedestrian traffic in the crosswalk on the southeast corner of the intersection, and there is also a "green arrow" signal for right turns for northbound traffic.

The crosswalk from the northeast corner to the southeast corner of the intersection is approximately 12 feet in width. At the time of the accident, plaintiff, who was approximately 75 years of age, was with her sister on the northeast corner of the intersection and intended to and did commence to cross the east crosswalk in a southerly direction with the intention of taking a bus to her home, the bus stop being on the east side of the southeast corner of the intersection, the buses facing in a northerly direction at that location and being next to the east curb of the street. Plaintiff and her sister had come from south Omaha and had been to a cafeteria on the north side of Douglas Street for dinner and had their transfers for their bus ride to their respective homes. At or shortly before the time of the accident in question, the defendant was driving his automobile north on 15th Street and stopped his automobile in the second lane from the curb behind another

car which was also stopped for the red light facing them. When the traffic light facing them changed from red to green, the car ahead of him moved out and made a right turn onto Douglas Street and Mitchell made a right turn behind that car. Before turning, he testified he observed the crosswalk area but saw no one while turning and saw people standing on the northeast corner of the intersection but saw no one in the crosswalk. At the time he crossed the crosswalk the speed of his vehicle was about 4 to 5 miles per hour. As he was moving out of the intersection he heard the sound of something bumping his car on the left side at the rear. He immediately stopped his automobile; and while the testimony was conflicting, it appears that only the left rear portion of the car was still in the crosswalk. A passenger in his automobile, one Willie Williams, confirmed the testimony of the defendant and in addition testified that he saw the plaintiff walk into the side of the defendant's car, at which time all of the defendant's car was east of the crosswalk except the rear quarter panel. Terry R. Campbell, a witness for the plaintiff, was a policeman who investigated the accident. He testified that he had interviewed the plaintiff at the hospital following the accident and that he had asked her what had happened. He was asked as to what she told him, and he replied, "The pedestrian, Holly, stated that she saw her bus at the bus stop, and it was necessary for her to catch that particular bus to avoid a 45-minute wait. She stated that she crossed the street and, 'made a run for it,' to avoid cars that were coming, but one car hit her." Plaintiff's sister, Alma Logsdon, who was with the plaintiff at the northeast corner of the intersection prior to the plaintiff starting to cross the street, was asked: "Q. How was it that you knew that she saw the bus? Did she tell you that as she was crossing the street?" Her answer was: "A. Well, I think when the bus was standing there when we started to cross the street she said, 'Well, there's

the bus,' and away she went." While plaintiff testified that she had a green light in her favor as she stepped off the curb (although there is no green light facing her in crossing from the north side of the street going south in the crosswalk), and that she had a green "walk" sign in her favor before she entered the crosswalk, there is also evidence in the record to the effect that in traversing the street she looked backward to look at her sister who was a slower walker than she was, and also looked west on Douglas Street to observe approaching traffic. She was asked: "Q. Did you ever see Mr. Mitchell's vehicle before the accident? A. Did I ever see—Q. Mr. Mitchell's vehicle? A. No." She also admitted that there was no obstruction between her and defendant's vehicle. There is also evidence in the record from which the jury could conclude that plaintiff, as she was crossing the street, was looking down into her purse to get her fare or transfer. She was asked: "Q. Is it possible that just before you came into contact with the Mitchell car you might have been looking down into your purse trying to get change for your bus or trying to get a transfer just before you came into contact with the Mitchell car, is that possible? A. I don't think so. I usually have my bus fare ready or transfer. Q. Do you remember which hand you were carrying your purse and your shopping bag in? Did you have a shopping bag, too? A. Yes, I think I did. Left hand. Q. And you had both of them in the left hand, didn't you? Your purse and shopping bag? A. Right. I did when I was getting my transfer—when I had to get my transfer. Q. Wasn't that while you were crossing the street? A. No. Q. When was it? A. When I got to the corner. . . . Q. All right. Didn't you have to look down into your purse when you went to get the bus fare or the transfer? A. Well, I *usually* had it in my hand ready. Q. But if it was in your purse then you'd have to look down, would you not? A. Yeah, but I'd usually have it ready when I'm

going to make that transaction." (Emphasis supplied.)

Plaintiff's sister, Alma Logsdon, was asked on cross-examination: "Q. Did your sister have a purse with her? A. Yes, sir. Q. And did the contents of that purse spill out on the street? A. Some of it did. Q. As a matter of fact, you were the one who kind of helped pick up the contents of the purse, aren't you? A. Yes, sir. Q. And did you pick up the purse itself, also? A. Yes, sir. Q. And it was open, was it not? A. Yes."

There is also testimony in the record to the effect that as plaintiff crossed the street, she was walking at a rapid pace, but she denied telling the police officer that she had crossed the street and "made a run for it" to avoid cars that were coming.

On the basis of the above evidence, including admissions against interest introduced during the trial, the trial court submitted the questions of the negligence of the defendant, the contributory negligence of the plaintiff, and the comparison thereof to the jury, which, as previously stated, found for the defendant.

Our review of the record convinces us that there were numerous disputed questions of fact involved in this case touching on both the issue of the defendant's negligence and the plaintiff's contributory negligence, and that the court properly submitted the issue to the jury. The facts pointing in either direction were not so clear cut as to require the court to make a finding of liability and direct a verdict as to the negligence of either party. The law is well established in this state that where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff and the degree thereof when one is compared with the other, the issues must be submitted to the jury. *Sullivan v. Geo. A. Hormel and Co.,* 208 Neb. 262, 303 N.W.2d 476 (1981); *Ybarra v. Wassenmiller,* 206 Neb.

164, 291 N.W.2d 725 (1980); *Treffer v. Seevers,* 195 Neb. 114, 237 N.W.2d 114 (1975); *Middleton v. Nichols,* 178 Neb. 282, 132 N.W.2d 882 (1965).

Counsel for plaintiff argues, however, that under the statutes of Nebraska in effect at the time of the accident, the plaintiff, who he contends was a pedestrian within a crosswalk, had the right-of-way over the defendant motorist who was required to yield to her, and, also, that since the plaintiff was a pedestrian facing a "walk" signal, it was required that she be given the right-of-way by defendant even though the signal may have changed during her crossing of the street. See Neb. Rev. Stat. §§ 39-614 and 39-615 (Reissue 1978). Plaintiff further contends that the court in its instructions failed to instruct on plaintiff's right-of-way as a pedestrian while crossing the street in the crosswalk, and, further, that the court erred in its instructions in telling the jury that the right of a pedestrian to the lawful use of the street or highway is in all respects equal to that of a person driving an automobile. On the contrary, the law in this state is well established that a pedestrian crossing at a regular crosswalk with the right-of-way has a right, until he has notice or knowledge to the contrary, to assume that others will respect his right-of-way. *Zawada v. Anderson,* 181 Neb. 467, 149 N.W.2d 329 (1967); *Miller v. Moeller,* 183 Neb. 508, 162 N.W.2d 224 (1968); *Dunlap v. Coleman,* 201 Neb. 148, 266 N.W.2d 527 (1978).

However, the law is also well settled that even though a statute grants the right-of-way to a pedestrian crossing a street in the crosswalk, it does not excuse contributory negligence on his part. *Farag v. Weldon,* 163 Neb. 544, 80 N.W.2d 568 (1957); *Laurinat v. Giery,* 157 Neb. 681, 61 N.W.2d 251 (1953); *Corbitt v. Omaha Transit Co.,* 162 Neb. 598, 77 N.W.2d 144 (1956); *Laux v. Robinson,* 195 Neb. 601, 239 N.W.2d 786 (1976).

Plaintiff specifically complains of instruction Nos. 13 and 13a given to the jury by the court, and con-

tends that such instructions were inaccurate and misled the jury. Instruction No. 13 given by the court is as follows: "The right of a pedestrian to the lawful use of a street or highway is in all respects equal to that of a person driving an automobile, but each person or vehicle on the street or highway must so exercise his right to use it as not to injure others and must exercise such caution as an ordinarily prudent person would exercise under like circumstances. In other words, the rights of pedestrians and motor vehicles on a public street or highway are equal and each is obliged to act as a reasonably prudent person would with respect to the movements of the other. A person having the right of way is nevertheless obligated to exercise ordinary care for his own safety and to avoid an accident." Instruction No. 13a given by the court is as follows: "If a pedestrian is lawfully in a crosswalk, such a pedestrian is not required to anticipate that another may violate such pedestrian's right-of-way, and such a pedestrian has a right to assume that her right-of-way will be respected by such a vehicle until such time as she is given actual knowledge of facts which indicate that the driver intends to violate her right-of-way.

"It is the duty of a driver of a motor vehicle and of a pedestrian to keep a proper lookout in the direction of anticipated danger. The duty to keep a lookout implies a duty to see that which is in view and to act with due care in accordance with the circumstances."

Also, in instruction No. 14, the jury was given verbatim the language of the statutes previously referred to.

We believe that the instructions given by the court were correct and represented an amalgamation of the various statutes and case law previously set out in this opinion. There is no showing in the record that the instructions given in any way misled or confused the jury. We have held that instructions

should be considered together, and if, when considered as a whole, they correctly state the law, error cannot be predicated thereon. *Zawada v. Anderson, supra.* We have also held that where instructions are not inconsistent or contradictory but, considered together, correctly state the law, the judgment will not be reversed because one does not state the entire law on the subject, unless it appears that the jury was misled. *Schram v. Lowden,* 144 Neb. 851, 15 N.W.2d 42 (1944). As stated above, we believe that the instructions given by the court were correct, and there is no showing in the record that the jury was in any way misled by such instructions.

While the basis on which the jury rendered its verdict for the defendant does not appear from the record, i.e., whether because of lack of negligence of the defendant or more than slight contributory negligence of the plaintiff, it is presumed in a jury trial that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong. *Nisi v. Checker Cab Co.,* 171 Neb. 49, 105 N.W.2d 523 (1960).

Plaintiff has also assigned as error failure of the court to give the jury the instructions requested by her. We have examined the requested instructions and believe that they were substantially given in the instructions actually given the jury by the court. This assignment of error is without merit.

In view of what we have stated above, we conclude that the judgment entered by the trial court was correct; and no reversible error appearing in the record, such judgment must be affirmed.

AFFIRMED.

AMERICAN STORES PACKING COMPANY, A DIVISION OF ACME MARKETS, INC., APPELLEE, V. JUDITH E. JORDAN, APPELLANT.

328 N.W.2d 756

Filed December 30, 1982. No. 81-691.

1. **Civil Rights: Discrimination: Appeal and Error.** An appeal to the District Court from an order or decision of the human rights commission of a city of the primary class in an employment discrimination case is heard as in equity and without a jury.
2. **Equity: Appeal and Error.** In an appeal in an equity action it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the District Court.
3. **Civil Rights: Discrimination: Appeal and Error.** To sustain a charge of discrimination in employment where there is no charge of a universal discriminatory practice or system, complainant, in the record, must establish that the employer intentionally engaged in acts that discriminated against complainant in violation of the statutory prohibitions.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Terry K. Barber of Johnston, Barber & Wherry, for appellant.

J. Taylor Greer of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

MCCOWN, J.

This is an action by the complainant, Judith Jordan, alleging that she was discharged from her employment because of unlawful racial discrimination. On appeal from an order of the human rights commission of the city of Lincoln, Nebraska, reinstating complainant, the District Court found that complainant's discharge was for just and sufficient cause unrelated to race or color. The District Court reversed the order of the human rights commission and dismissed the complaint. Complainant has appealed.

Jordan, a black woman, was employed by American Stores Packing Company on October 28, 1974. After a probationary period she obtained a seniority date of January 1, 1975. During the period of her employment with American Stores she worked chiefly in the bacon department as an arranger on the bacon slice line. Two arrangers work on each bacon slice line, one on each side of the conveyor belt. The arrangers arrange the bacon slices on a card and then place the arranged cards of bacon on another conveyor belt leading to a vacuum packing machine.

On Wednesday, January 28, 1976, Jordan was working as an arranger on the south side of a bacon slice line and Maxine Lehnherr, a white woman, was working across from her as the arranger on the north side of the line. Lehnherr had previously suffered an on-the-job accident, which caused some nerve and blood vessel injury to her right shoulder, and she found it painful for her to work at her usual position on the north side of the line because of the reaching and stretching of her right arm and shoulder on that side. Lehnherr had a letter from her doctor recommending that she avoid repeated use of her right arm and shoulder.

During work on January 28, Lehnherr asked the supervisor of the shift if she could trade positions with Jordan because her right arm was painful. The supervisor asked Jordan if she would mind trading positions with Lehnherr at the next break and Jordan said she would not mind.

Before the break, however, another employee, Delores Napue, told Jordan that she should not have to switch positions because she had seniority over Lehnherr, and also told Jordan that a posted notice forbade trading jobs by the employees. Jordan told the supervisor of her conversation with Napue, and the supervisor advised her that he did not think seniority mattered in the particular situation but he had another employee switch positions with

Lehnherr and permitted Jordan to stay at her regular position.

On Thursday, January 29, the shift supervisor checked with his superior and with the personnel director of the company with respect to the situation and was informed by the personnel director that a supervisor could change work assignments without regard for seniority whenever the change was required for medical reasons. Later on the same day Jordan, without seeking permission, voluntarily changed sides with another employee who was having trouble working on the north side of the line.

On Friday, January 30, Lehnherr's right arm was still bothering her and she asked the supervisor if she could change sides of the line. The supervisor asked Jordan to change and told her that seniority did not matter and ordered her to change positions with Lehnherr. Jordan refused, and the supervisor told her to either change positions, go to the personnel office, or go home.

Jordan went to the personnel office where the associate personnel director informed her that she was required to follow the supervisor's order. Jordan then talked to her union steward, who also advised her to change sides. After approximately 25 minutes of discussion Jordan agreed to change sides with Lehnherr and returned to work.

On Monday, February 2, Lehnherr and Jordan went to work again on the same line, with Lehnherr on the north side. Lehnherr's arm again began to pain her and she again requested a change. The supervisor ordered Jordan to change sides but she refused. The supervisor ordered her to change positions or to leave the plant. Both the union shop steward and the business agent of the union advised Jordan to follow the supervisor's order. Jordan refused and left the plant at midshift after approximately 4 hours of work.

On February 3 the personnel director held a hearing regarding the incidents of January 30 and Febru-

ary 2. Jordan, two union representatives, and the supervisor were all present. The only reasons given by Jordan for her refusal to change sides were that her seniority gave her the right to choose sides and that there was a posted notice forbidding employee job trading. At the conclusion of the hearing the personnel director informed Jordan that she was suspended without pay pending further investigation.

Following an additional hearing on February 13, 1976, the personnel director informed Jordan that she was discharged for insubordination for her conduct on January 30 and February 2 in violation of rules 26 and 42 contained in the employees' handbook.

On February 6, 1976, Jordan filed a complaint with the human rights commission of the city of Lincoln alleging that the actions of American Stores Packing Company constituted an unlawful employment practice because it discriminated against her on account of race or color in violation of Lincoln Municipal Code § 11.08.040 (1973). That ordinance provides in part: "It shall be an unlawful employment practice for an employer: . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his . . . conditions or privileges of employment, because of such individual's race, color . . . ."

The commission concluded there was reasonable cause to believe the charge was valid and a formal hearing was had before the commission in several sessions, concluding on May 2, 1978. Evidence establishing the facts outlined above was introduced and received. Jordan introduced evidence of five alleged racially discriminatory statements or incidents occurring between employees, some of which may have been overheard by supervisory personnel. The employer introduced evidence tending to establish that the discharge of Jordan was for legitimate and necessary business reasons and for just and

sufficient cause unrelated to any racial discrimination.

The evidence also showed that Jordan had filed a complaint with the Nebraska Equal Opportunity Commission in 1975 alleging racial harassment by American Stores, and complaints in February of 1976 with both the Nebraska Equal Opportunity Commission and the federal Equal Employment Opportunity Commission, also alleging racial harassment by American Stores. In all three cases the commissions had found there was no probable cause to believe that the charges were true and dismissed the complaints.

On June 6, 1978, the human rights commission entered its order finding that an atmosphere of racial antagonism existed at the American Stores plant as evidenced by five racially discriminatory statements or incidents occurring among employees, and found that the management was aware of the racially antagonistic atmosphere. The commission made no finding as to whether Jordan's conduct on January 30 and February 2, 1976, constituted insubordination, nor whether she was discharged because of her race. The commission ordered Jordan reinstated and awarded her one-half of the wages she would have earned after her discharge.

The employer appealed to the District Court and Jordan cross-appealed. The cross-appeal requested the award of full back pay rather than one-half. On June 26, 1981, after trial de novo on the record made before the human rights commission, the District Court found the evidence insufficient to establish any violation, either intentional or unintentional, of Lincoln Municipal Code, Ch. 11.08 (1973). The court also found complainant's conduct constituted insubordination and that her discharge was for just and sufficient cause, unrelated to race or color. The District Court therefore reversed the order of the human rights commission and dismissed the complaint. The complainant has appealed.

An appeal to the District Court from an order or decision of the human rights commission of a city of the primary class in an employment discrimination case is heard as in equity and without a jury. The District Court is to determine anew all questions raised before the commission and may reverse or affirm, wholly or partly, or may modify the order or decision brought up for review. See Neb. Rev. Stat. § 15-1205 (Reissue 1977).

In an appeal in an equity action it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the District Court. *Schupack v. McDonald's System, Inc.*, 200 Neb. 485, 264 N.W.2d 827 (1978).

In *Duffy v. Physicians Mut. Ins. Co.*, 191 Neb. 233, 214 N.W.2d 471 (1974), in an employment discrimination case under a state statute containing language identical to the municipal ordinance involved here, this court held that to sustain a charge of discrimination where there is no charge of a universal discriminatory practice or system, complainant, in the record, must establish that the employer intentionally engaged in acts that discriminated against complainant in violation of the statutory prohibitions.

It is clear in the present case that the charge related solely to the discharge of the individual complainant. Lincoln Municipal Code § 11.08.150(c) (1973) states that the human rights commission "shall determine that the respondent has intentionally engaged in or is intentionally engaging in any unlawful employment practice" before ordering any affirmative action.

The commission in this case failed to find that the respondent had intentionally engaged in discriminatory conduct and also failed to make any finding as to whether the complainant's conduct constituted insubordination. There is no evidence in the record that the management of the employer intended to

discriminate against the complainant because of her race, nor that it intentionally or unintentionally discriminated against her because of her race. There can be no reasonable doubt that the complainant's conduct constituted repeated insubordination.

The record fully supports the conclusion that the employer's conduct in suspending and discharging the complainant was motivated by sound business reasons and not by unlawful discriminatory motives.

The District Court was correct in all respects and the judgment is affirmed.

AFFIRMED.

JANET LEROYCE MILLER, APPELLANT, V. DONIVAN MICHAEL MILLER, APPELLEE.

328 N.W.2d 210

Filed December 30, 1982. No. 82-487.

1. **Actions: Demurrer.** The pendency of another action does not ipso facto require that a demurrer be sustained.
2. **Actions: Plea in Abatement.** Generally, the pendency of a former action for the same cause between the same parties and in the same court constitutes a good plea in abatement.
3. _____: _____. The general rule that pendency of a prior action between the same parties for the same cause may be pled in abatement of a subsequent action will not be sustained where the prior action is pending in a court of a foreign or different jurisdiction.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded.

Jay L. Welch and Douglas R. Semisch of Rickerson & Welch, for appellant.

Steven J. Lustgarten, P.C., of Lustgarten & Roberts, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

CAPORALE, J.

In this appeal petitioner-appellant, Janet LeRoyce Miller, challenges the order of the trial court sustaining the demurrer of respondent-appellee, Donivan Michael Miller, and dismissing her petition. We reverse.

Petitioner alleged that the parties have been domiciled in Nebraska since their marriage, December 4, 1971; alleged the other statutory requirements for a dissolution of marriage action, calling the court's attention to the fact that the parties in this action were parties to a dissolution of marriage action pending in California which had not become final; alleged that the California action had been initiated by petitioner less than 12 months after she had traveled from Nebraska to California as the result of fraud practiced upon her by respondent; alleged that petitioner had been absent from Douglas County, Nebraska, less than 18 months; and prayed for dissolution of the marriage together with other relief, including that petitioner be awarded custody of the parties' two minor twin children and that respondent be temporarily and permanently enjoined from relying upon any order, award, or decree in the California proceedings.

Respondent demurred only on the ground that there was another action pending between the parties for the same cause. Neb. Rev. Stat. § 42-353(5) (Reissue 1978) requires that a petition for dissolution of marriage recite whether the petitioner is a party to any other pending action for divorce, separation, or dissolution of marriage and, if so, that it state where such action is pending. Neb. Rev. Stat. § 25-806 (Reissue 1979) provides that "The defendant may demur to the petition only when it appears on its face . . . (3) that there is another action pending between the same parties for the same cause . . . ."

It does not necessarily follow, however, that the pendency of another action ipso facto requires that

the demurrer be sustained and the second action dismissed.

In *Flaxel v. Flaxel,* 101 Neb. 799, 165 N.W. 159 (1917), the wife filed an action for divorce in Platte County in which, pursuant to notice, the court ordered the husband to pay the wife certain suit and maintenance money. Thereafter, the husband pled in the Platte County suit that he had previously filed a suit for divorce against the wife in Butler County and asked that the Platte County suit be dismissed and that its order entered therein be set aside. The Platte County District Court dismissed the action and modified the order with respect to maintenance but refused to vacate the order for payment of suit money. In affirming the Platte County District Court we said at 800-01, 165 N.W. at 160: "When two actions are pending in different courts of competent jurisdiction between the same parties and for the same cause, the pendency of the first action will be sufficient ground for a plea in abatement to the second action, and if final judgment is entered upon the merits in the first action, such judgment will be a bar to further proceedings in the second action. The pendency of the first action is a fact which may be pleaded in bar or in abatement to the second action, and when so pleaded the court has jurisdiction to try and determine that issue. It cannot therefore be said that the court did not have jurisdiction to enter the order for suit money upon motion and due notice to the defendant. He suggests that, if the court in one county has jurisdiction to entertain an action where another action between the same parties and for the same cause is pending in another county, this plaintiff 'might have gone into each and every judicial district in the state of Nebraska and repeated the performance.' But the law does not allow such vexatious litigation, and furnishes ample remedies if it is attempted." We have stated in a variety of other cases that, generally, the pendency of a former action for the same cause between the same

parties and in the same court constitutes a good "plea in abatement." *Cahoon v. First Nat. Bank,* 112 Neb. 462, 199 N.W. 830 (1924); *Stearns v. Nebraska Building & Investment Co.,* 109 Neb. 657, 192 N.W. 330 (1923); *Spencer v. Johnston,* 58 Neb. 44, 78 N.W. 482 (1899). The two actions involved here, however, are not in the same court; indeed, they are pending in courts of different and sovereign jurisdictions. The general rule that pendency of a prior action between the same parties for the same cause may be pled in abatement of a subsequent action will not be sustained where the prior action is pending in a court of a foreign or different jurisdiction. 1 C.J.S. *Abatement and Revival* § 63 (1936). See, also, 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 5 (1962). It must be concluded, therefore, that the pendency of the California action does not bar the present action and the demurrer ought not have been sustained, nor the petition dismissed.

It may be that under the provisions of the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1202 et seq. (Cum. Supp. 1982), or for other reasons, the court below may conclude that it should defer to the California court. It may also be that any dissolution finally granted by the California court would not be enforceable under the provisions of the Nebraska Uniform Divorce Recognition Act, Neb. Rev. Stat. §§ 42-341 et seq. (Reissue 1978). However, those questions are not properly presented by the status of the pleadings in this case and cannot be determined at this time.

The order of the court below is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

VERNETTA MARICLE, APPELLEE AND APPELLANT, V. RICHARD A. SPIEGEL, DOING BUSINESS AS SPIEGEL OIL COMPANY, ET AL., APPELLANTS AND APPELLEES, MOBIL OIL CORPORATION, A CORPORATION, APPELLEE.

329 N.W.2d 80

Filed January 7, 1983. No. 44283.

1. **Parties: Appeal and Error.** An appellee can not cross-appeal against another appellee.
2. **Pleadings.** The decision to allow or deny an amendment to the pleadings lies within the discretion of the trial court.
3. **Negligence.** The doctrine of last clear chance applies where there is negligence of the defendant subsequent to the negligence of the plaintiff, and the defendant's negligence is the proximate cause of the injury.
4. _____. Last clear chance is applicable only to excuse the contributory negligence of a plaintiff.
5. **Trial: Evidence: Appeal and Error.** Generally, a proper objection to the receipt of evidence is required to preserve for review any error in the overruling of a motion in limine.
6. _____: _____: _____. A defendant can not predicate error on the denial of a motion in limine when his objection to the evidence was sustained.
7. **Motor Vehicles: Evidence.** The admissibility of the speed of a vehicle shortly before a collision rests largely in the discretion of the trial court.
8. **Photographs: Appeal and Error.** The admission or rejection of photographs in evidence is largely within the discretion of the trial court. In the absence of a showing of an abuse of discretion, error may not be predicated upon such a ruling.
9. **Pleadings: Damages: Waiver.** Failure to plead mitigation of damages waives the defense.
10. **Negligence: Pleadings.** Recovery can not be had for acts of negligence not alleged in the petition.
11. **Evidence:** Proof as to the tax consequences of a personal injury damages award is not admissible.
12. **Verdicts: Appeal and Error.** A verdict will not be set aside unless it is against the weight of the evidence, or appears to have been the result of passion, prejudice, mistake, or disregard of the rules of evidence or the law.
13. _____: _____. A jury verdict will not be disturbed on appeal unless it is clearly erroneous.
14. **Contracts: Independent Contractors.** Generally, control, or the right of control, is the chief criterion in determining whether someone acts as an independent contractor.

Appeal from the District Court for Boone County:

JOHN C. WHITEHEAD, Judge. Affirmed.

Jewell, Otte, Gatz & Collins, for appellants and appellees Spiegel.

Robert P. Chaloupka of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee and appellant Maricle.

Timothy J. Pugh of Boland, Mullin & Walsh, for appellee Mobil Oil.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

These cases arose out of an automobile accident which occurred on August 2, 1979, in Boone County, Nebraska. Chip Maricle was severely injured when his pickup truck collided at a rural intersection with a Mobil tank truck owned by the defendant Richard A. Spiegel and driven by the defendant Rick A. Spiegel. An action was brought by Vernetta Maricle as guardian and conservator of Chip Maricle to recover damages for his personal injuries. A separate action was brought by Vernetta Maricle as the wife of Chip Maricle for loss of consortium and personal damages she suffered as a result of the injuries to her husband. The actions were consolidated for trial and have been docketed in this court as one appeal.

The jury could find that the accident occurred when Rick A. Spiegel, in the course of his employment, failed to stop the westbound truck at a stop sign before entering the intersection. The pickup driven by Maricle was southbound and had the right-of-way. There was conflicting evidence with regard to the speed of the Maricle vehicle. Both eyewitness and expert testimony was admitted on the issue. There was also conflicting evidence as to the founda-

tion upon which the expert testimony was based, most notably the presence or absence of skid marks caused by the Maricle vehicle.

Plaintiff also sought recovery for Chip Maricle's injuries against Mobil Oil Corporation.

The case was submitted to the jury upon issues of negligence and contributory negligence. The jury returned a verdict in the amount of $1,500,000 for the personal injuries of Chip Maricle, and $200,000 to Vernetta Maricle for her damages. The jury returned a verdict in favor of Mobil Oil Corporation.

The defendants (Spiegel) appealed, and the plaintiff appeals from the judgment in favor of Mobil. Although the plaintiff has denominated her appeal as a cross-appeal, since she filed notices of appeal, the matter will be treated as an appeal. The plaintiff and Mobil are appellees and an appellee can not cross-appeal against another appellee. *Buffalo County v. Richards,* 212 Neb. 826, 326 N.W.2d 179 (1982); *Hansen v. Hasenkamp,* 192 Neb. 530, 223 N.W.2d 44 (1974).

Spiegel assigns as error the trial court's overruling of a motion to amend defendants' answer to conform to the proof, to include the defense of "last clear chance." Spiegel argues that Maricle had the last clear chance to avoid the accident. Neb. Rev. Stat. § 25-852 (Reissue 1979) permits the court, in furtherance of justice, to amend the pleadings to conform to the proof. The decision to allow or deny an amendment lies within the discretion of the trial court. *Mahoney v. May,* 207 Neb. 187, 297 N.W.2d 157 (1980).

Generally, last clear chance has been described as: "[T]he rule implies that one charged with negligence knew the person injured was in a place of danger and negligently failed to avoid injuring him. . . .

. . . .

"The doctrine . . . applies where there is negligence of the defendant subsequent to the negligence

of the plaintiff and the defendant's negligence is the proximate cause of the injury." *Parsons v. Berry,* 130 Neb. 264, 267-68, 264 N.W. 742, 744 (1936). See, *Roby v. Auker,* 149 Neb. 734, 32 N.W.2d 491 (1948); *Loudy v. Union P. R. R. Co.,* 146 Neb. 676, 21 N.W.2d 431 (1946); *Malcom v. Dox,* 169 Neb. 539, 100 N.W.2d 538 (1960).

A more detailed definition is given in *Bush v. James,* 152 Neb. 189, 195, 40 N.W.2d 667, 672 (1950): "We said, in Carter v. Zdan, 151 Neb. 185, 36 N.W.2d 781: 'In order to recover under the doctrine of last clear chance there must be sufficient evidence to sustain a finding that the party invoking the doctrine was by his own negligence immediately before the accident in a position of peril from which he could not escape by the exercise of ordinary care; that the party against whom it is asserted knew or ought to have known of the other's peril; that the party against whom the doctrine is invoked had the present ability with the means at hand to avoid the accident without injury to himself or others; that the failure to avoid the accident was due to a want of ordinary care on the part of the person against whom the doctrine is invoked and that such want of ordinary care was the proximate cause of the accident; and that the negligence of the party imperiled is neither active nor a contributing factor in the accident. * * * The doctrine has no application unless the person claiming its benefit puts himself in the position of admitting that immediately before the accident he found himself in a place of peril through his own negligence from which he could not escape by the exercise of ordinary care.' "

Prosser describes "last clear chance" as the "most commonly accepted modification of the strict rule of contributory negligence." He states that the doctrine worked well in the older-day attempt to fix liability upon the "last human wrongdoer," but that it is out of line with modern concepts of proximate cause. He adds that a few courts have attempted to

recognize a last clear chance in favor of the defendant, "but since this comes out at exactly the same place as the defense of contributory negligence without the doctrine at all, and is calculated only to bewilder the jury with incomprehensible instructions, most courts have rejected any such idea." W. Prosser, Law of Torts, *Negligence: Defenses* § 66 at 427-29 (4th ed. 1971). See, also, Annot., 32 A.L.R.2d 543 (1953).

It was not an abuse of discretion for the trial court to overrule the motion to amend the pleadings. See *Rawlings v. Andersen*, 195 Neb. 686, 240 N.W.2d 568 (1976). Last clear chance is applicable only to excuse the contributory negligence of the plaintiff. To permit defendant to raise it as a defense would permit him to place the issue of contributory negligence before the jury in two different ways and confuse the jury. See, e.g., *Ballard v. Rickabaugh Orchards, Inc.*, 259 Or. 200, 485 P.2d 1080 (1971).

Furthermore, the doctrine of last clear chance is factually inapplicable, as the negligence of the party seeking to invoke it was active and continuing as a contributing factor up to the time of injury. See *Roby v. Auker, supra.*

Spiegel next argues that the trial court's overruling of his motion in limine and the admission and exclusion of certain evidence was prejudicial and deprived Spiegel of having a fair trial.

Plaintiff sought to introduce evidence concerning Maricle's safe driving habits. The defendants' objection was sustained. The defendants can not predicate error on the denial of the motion in limine when the objection to the evidence was sustained.

Spiegel made a motion to exclude evidence of the speed of the Maricle vehicle 1 mile from the site and evidence of Maricle's safe driving habits. Generally, a proper objection to the receipt of evidence is required to preserve for review any error in the overruling of a motion in limine. See, *Twyford v.*

Weber, 220 N.W.2d 919 (Iowa 1974); *Vorthman v. Keith E. Myers Enterprises*, 296 N.W.2d 772 (Iowa 1980); Annot., 63 A.L.R.3d 311 (1975).

Spiegel objected on the basis of relevancy to the admission of eyewitness testimony that Maricle's speed was 35-40 m.p.h. 1 mile from the intersection. The objection was overruled. The admissibility of the speed of a vehicle shortly before a collision rests largely in the discretion of the trial court. *Schwarting v. Ogram*, 123 Neb. 76, 242 N.W. 273 (1932). However, this rule of discretion generally does not permit admission unless there can be drawn a reasonable inference that the speed continued until impact (if points are of close proximity) or there is evidence from which such inference could be drawn (if points are more remote). *Prince v. Petersen*, 144 Neb. 134, 12 N.W.2d 704 (1944); *Shields v. County of Buffalo*, 161 Neb. 34, 71 N.W.2d 701 (1955); *Sandrock v. Taylor*, 185 Neb. 106, 174 N.W.2d 186 (1970).

In the present case there is evidence from which a reasonable inference of continued speed to the point of impact could be drawn. Those factors are the age and type of vehicle driven by Maricle, the distance the witness observed the vehicle (2 blocks), and the presence of a ½-mile uphill grade north of the intersection. The accident reconstruction expert called by the plaintiff in rebuttal testified that the information as to the speed of the Maricle vehicle 1 mile from the intersection was important. Under the circumstances in this case the evidence was properly admitted.

Spiegel argues that the admission of expert testimony regarding speed offered by the plaintiff on rebuttal amounted to an abuse of discretion. The plaintiff attempted to introduce expert testimony that the speed of the Maricle vehicle could not have increased dramatically from the point it was observed by the witness to the point of impact, due to the uphill grade. The expert based his opinion on a test drive performed with his own car. Spiegel's

first objection to the opinion was overruled. However, when the expert testified as to the basis for his opinion, Spiegel's objection was sustained, the testimony was ordered stricken, and the jury was instructed to disregard the testimony. Any error which may have occurred in the admission of this testimony was cured by striking it and instructing the jury. See *Palma v. Barta,* 203 Neb. 459, 279 N.W.2d 130 (1979).

Spiegel next assigns as error the admission of several photographs as being prejudicial and cumulative. Photos of Maricle in his hospital bed and of Maricle before and after the accident, together with the family, are at issue. Maricle argues that the photos were relevant evidence of the deterioration in his physical condition. " 'The admission or rejection of photographs in evidence is largely within the discretion of the trial court. In the absence of a showing of an abuse of discretion, error may not be predicated upon such ruling.' " *Rowedder v. Rose,* 188 Neb. 664, 669, 199 N.W.2d 18, 21 (1972), quoting *Peterson v. Skiles,* 173 Neb. 470, 113 N.W.2d 628 (1962).

In *Schmailzl v. State,* 176 Neb. 617, 126 N.W.2d 821 (1964), the issue was similar to the one presented here. The court said: "The State assigns as error the introduction of certain family photographs, contending that their purpose was to arouse the sympathy of the jury. . . .

"The photographs offered, while taken for family purposes, did have probative value. . . . The trial court did not abuse its discretion in admitting the photographs. They are within the ambit of the rule announced in Anderson v. Evans, 164 Neb. 599, 83 N.W.2d 59: 'The possibility that the photographs might have a tendency to create sympathy in favor of one party should not render them inadmissible as proof of an issue on the trial.' " *Id.* at 623-24, 126 N.W.2d at 825.

On cross-examination of a doctor and the ambu-

lance driver, Spiegel attempted to inquire into the use or nonuse of a seatbelt and the effect that it would have had on Maricle's injuries. No evidence had been received regarding the presence of a seatbelt and, if so, whether Maricle had used it. Objections to the questions were sustained. Spiegel argues on appeal that the use of seatbelts is relevant to the issue of mitigation of damages and the evidence was wrongfully excluded.

There are no Nebraska cases regarding the pleading of mitigation of damages. In the following cases mitigation of damages was held to be an affirmative defense, required to be set forth in the pleadings. *Consolidated Mtg. & Finance Corp. v. Landrieu,* 493 F. Supp. 1284 (D.D.C. 1980); *Toushin v. Gonsky,* 77 Ill. App. 3d 508, 395 N.E.2d 1124 (1979); *Iowa Power & Light Co. v. Bd. of Water Works, Etc.,* 281 N.W.2d 827 (Iowa App. 1979); *Peeples v. Sargent,* 77 Wis. 2d 612, 253 N.W.2d 459 (1977); *Sprecher v. Weston's Bar, Inc.,* 78 Wis. 2d 26, 253 N.W.2d 493 (1977). Spiegel's failure to plead waives the defense.

Some courts have found that failure to use a seatbelt presents a question as to whether the plaintiff used due care. See, e.g., *Truman v. Vargas,* 275 Cal. App. 2d 976, 80 Cal. Rptr. 373 (1969). Recent cases include *Brodvin v. Hertz Corp.,* 487 F. Supp. 1336 (S.D.N.Y. 1980), in which the court held that nonuse of a seatbelt "can be considered by a jury in determining whether the plaintiff in an accident case exercised due care to avoid or mitigate injury to himself." *Id.* at 1338. These cases indicate that failure to use a seatbelt is relevant to the issue of due care, and thus to the issue of contributory negligence. In Spiegel's answer, specific acts of contributory negligence were enumerated, but failure to use a seatbelt was not alleged. " 'A recovery cannot be had for acts of negligence not alleged in the petition. The rule is the allegata and probata must agree.' " *Edmunds v. Ripley,* 172 Neb. 797, 808, 112

N.W.2d 385, 392 (1961); *Lund v. Holbrook,* 153 Neb. 706, 46 N.W.2d 130 (1951).

Spiegel assigns as error the rejection of the offer of proof as to the tax consequences of a personal injury damages award. He relies on *Ott v. Frank,* 202 Neb. 820, 277 N.W.2d 251 (1979), as standing for the proposition that such tax consequences may be brought out in evidence. The case does not support his contention, but merely permits inquiry into the projected tax liability of the decedent, had he lived, when computing damages in a wrongful death action.

Generally, the courts have taken three positions on the admissibility of tax liability for personal injury awards. The majority position is that tax savings should not be deducted and that the jury should not be instructed with regard to taxes. A second position is that to fail to permit reduction due to tax savings overcompensates the plaintiff. A third approach finds the evidence relevant on a case-by-case basis. See D. Dobbs, Remedies § 8-8 (1973).

There are no Nebraska cases on the issue. A recent case finding such evidence inadmissible is *Eriksen v. Boyer,* 225 N.W.2d 66 (N.D. 1974). The court said at 73-74: "Boyer asserts that the court erred in refusing to give a requested instruction to the effect that damages awarded to the plaintiff are not taxable to him as income. We hold that the court was clearly correct in refusing the instruction. We adhere to the majority rule that it is improper to instruct the jury that an award of damages is not subject to income tax and that such tax should not be considered in fixing the amount of damages. . . . We agree with the statement of the Illinois Supreme Court in Hall v. Chicago & North Western Ry. Co., 5 Ill. 2d 135, 151, 125 N.E.2d 77, 86 (1955):

" 'It is a general principle of law that in the trial of a lawsuit the status of the parties is immaterial. Thus, what the plaintiff does with an award, or how

the defendant acquires the money with which to pay the award, is of no concern to the court or jury. Similarly, whether the plaintiff has to pay a tax on the award is a matter that concerns only the plaintiff and the government. The tortfeasor has no interest in such question. And if the jury were to mitigate the damages of the plaintiff by reason of the income tax exemption accorded him, then the very Congressional intent of the income tax law to give an injured party a tax benefit would be nullified.

. . . .

" 'We are of the opinion that the incident of taxation is not a proper factor for a jury's consideration, imparted either by oral argument or written instruction. It introduces an extraneous subject, giving rise to conjecture and speculation.' "

The offer of proof was properly rejected.

Spiegel's final assignment of error is that the verdict was excessive. The rule in Nebraska is that a verdict will not be set aside unless it is against the weight of the evidence, or appears to have been the result of passion, prejudice, mistake, or disregard of the rules of evidence or the law. *Palma v. Barta,* 203 Neb. 459, 279 N.W.2d 130 (1979); *Caradori v. Fitch,* 200 Neb. 186, 263 N.W.2d 649 (1978).

Chip Maricle was 32 years of age at the time of the accident. He was married and had two children. He was engaged in a farming partnership with his father. His average annual income from 1978 to 1980 was in excess of $37,000. He is permanently totally disabled as a result of his injuries and is presently confined to a nursing home. The damages awarded totaled $1,700,000. There was evidence that Maricle's loss of income and medical expenses alone will amount to $1,540,586.14. As we view the record, the verdict was not excessive.

Maricle appeals from the judgment in favor of Mobil, arguing that the verdict was against the weight of the evidence. A jury verdict will not be disturbed on appeal unless it is clearly erroneous,

against the preponderance of the evidence, and so clearly contrary to the findings that it is the duty of the reviewing court to correct it. *Krug v. Laughlin,* 208 Neb. 367, 303 N.W.2d 311 (1981); *Lintner v. Roos,* 202 Neb. 476, 276 N.W.2d 93 (1979).

The jury was properly instructed that Mobil was not liable if Spiegel's relationship to Mobil was that of an independent contractor. Generally, control, or the right of control, is the chief criterion in determining whether someone acts as an independent contractor. See *Todd v. Boals,* 187 Neb. 51, 187 N.W.2d 284 (1971). Other factors include the independence the workman enjoys, the degree of supervision of the work, whether tools are provided by the workman or the other party, and the method of payment. See *Meyer v. State Farm Mut. Auto. Ins. Co.,* 192 Neb. 831, 224 N.W.2d 770 (1975).

The evidence clearly supports the jury verdict. Spiegel hired his own employees and paid them from his own account. He withheld taxes from their wages. Billings to and payments from customers were handled by Spiegel. Mobil did not direct Spiegel in the control of the employees. Mobil had a marketing representative who visited Spiegel regularly; however, his directives were considered by Spiegel more advisory than as commands. Spiegel set his own prices and did not feel compelled to use company advertising.

There being no error, the judgments of the District Court are affirmed.

AFFIRMED.

WHITE, J., participating on briefs, concurs in the result.

THE OMAHA FISH AND WILDLIFE CLUB, INCORPORATED, APPELLEE, V. COMMUNITY REFUSE DISPOSAL, INC., AND RONALD B. ROOTS, APPELLANTS.

329 N.W.2d 335

Filed January 7, 1983. No. 44485.

1. **Zoning: Ordinances: Comprehensive Development Plans.** A comprehensive development plan is merely a policy statement that may be implemented by a zoning resolution. It is the zoning resolution which has the force of law. If there is a conflict between a comprehensive plan and a zoning ordinance, the zoning ordinance contains the controlling provisions when questions of a citizen's property rights are at issue.
2. **Zoning: Ordinances.** The operation of a commercial sanitary landfill is not a recognized incidental use to a farming operation so as to be considered an accessory use under zoning ordinances.
3. **Pleadings.** The pleadings frame the issues between the parties, and the evidence must be confined to those issues.
4. **Zoning.** In order for an expenditure to have been made in good faith reliance upon improper zoning of a property, it must appear that the expenditures were made before any question as to the validity of the zoning was raised.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed.

Herbert J. Elworth of Casey & Elworth, and Croker, Huck & McReynolds, for appellants.

Michael J. Mooney of McCormack, Cooney, Mooney & Hillman, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

HASTINGS, J.

The defendants have appealed from an order of the District Court permanently enjoining them from operating a solid waste disposal area on certain real property located in Cass County. On appeal to this court, the defendants assign as error that the court (1) incorrectly found that the Cass County zoning ordinance prohibited operation of a licensed solid waste disposal landfill in an area zoned "A" Rural and Public Use District; (2) failed to find that the

particular site was immune from zoning control because the use as a landfill operation was in the performance of a governmental function not subject to zoning control; and (3) wrongfully revoked the approval granted by the Cass County officials under circumstances where the defendants had incurred substantial expense in good faith reliance upon such approval. We affirm.

The waste disposal area is located on farmland within Section 33, Township 13 North, Range 12 East of the 6th P.M. in Cass County, Nebraska, leased by defendants from the owner. It contains a large ravine which the defendants propose to fill with solid, baled waste material hauled under contract from the city of Omaha. Once filled, it is the intent of the owner of the property to reconvert this land to agricultural use.

The plaintiff is a nonprofit club owning recreational land 1 mile northeast of the landfill site. This land is located just south of the Platte River and consists of several small recreational lakes and various campgrounds. The plaintiff contests the defendants' use of the land in question as a violation of the Cass County zoning ordinance.

On October 4, 1978, the defendants made application to the Nebraska Department of Environmental Control for a license to operate a solid waste disposal area. As required by Neb. Rev. Stat. § 81-1518 (Reissue 1981), a hearing was had before the board of commissioners of Cass County on November 6, 1978. Notice of such hearing was published once in The Plattsmouth Journal on October 26, 1978. The result of that hearing was that a motion was passed that the "board approve the site as presented." It was not until June of 1979 that the plaintiff learned of the proposed use to be made of the property by the defendants. The plaintiff protested this use to the Cass County board by letters dated July 20, 1979, and November 6, 1979, and in person at a meeting of the board held on July 3, 1979. It was the plaintiff's po-

sition that in order to operate a landfill on the premises a change of zoning was required, which necessitates a more elaborate and extensive notice procedure. However, these protests were to no avail and this action was filed on December 6, 1979. Following the sustaining of a demurrer and dismissal of the petition, that action of the trial court was appealed to this court. We reversed and remanded for further proceedings. *Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc.*, 208 Neb. 110, 302 N.W.2d 379 (1981). The present proceeding followed.

The Cass County zoning ordinance is set up on a permissive basis, i.e., each district is outlined to allow only certain uses. The land in question is zoned "A" Rural and Public Use District. Article IV of the ordinance discusses what is a permissive use in an "A" Rural and Public Use District. Section 402 of that article states in part: "A building or premises shall be used only for the following purposes: 1. Single family dwellings . . . 2. Farming . . . 3. Lumbering . . . [4. does not appear.] 5. Publicly owned or operated properties . . . 6. Public parks . . . 7. Railroad tracks . . . 8. Single-family dwellings. 9. Churches . . . 10. Public elementary and high schools . . . 11. Cemeteries . . . 12. Hospitals . . . 13. Accessory building and uses customarily incident to any of the above uses . . . ." Nowhere is it stated that landfills are permitted uses in an "A" Rural and Public Use District. Article VIII of the zoning ordinance describes "I" Industrial District regulations, which permit a use "for any purpose not in conflict with any resolution of Cass County regulating nuisances or laws of the State of Nebraska; provided . . . that no . . . occupancy permit shall be issued for any of the following uses . . . until and unless the location . . . shall have been approved by the Board of Commissioners, after report by the Cass County Planning Commission. . . . Rendering and storage of dead animals, offal, garbage, or waste products." In addition, article XI pro-

vides Additional Use regulations, which provide that "The Board of Commissioners may, by special permit after public hearing, authorize the location of any of the following . . . uses in any district from which they are prohibited . . . 17. Industrial uses upon which the Board is required to pass under Article VIII."

The defendants advance three reasons why the maintenance of a solid waste disposal landfill is not prohibited in an area zoned "A" Rural and Public Use District. In the first place, they argue, nowhere in the six districts originally contained in the zoning ordinance is there any provision for the allowance of utilities and services. However, they say these uses consistently are allowed in all districts throughout the county, e.g., water, gas, and sewer lines, and telephone and electric power lines. The Cass County comprehensive plan states that "Utilities and services, as defined in this report, include water, sanitary and storm sewers, solid waste disposal, electric power, natural gas, and telephone service." Therefore, they conclude, having allowed the enumerated utility services, the county must permit the operation of a solid waste disposal service in all districts. Of course, it cannot seriously be contended that the *providing* of electricity, gas, water, sewers, and like utilities is not "accessory . . . uses customarily incident to any of the . . . uses" permitted by "A" Rural and Public Use District regulations. However, generating electricity, manufacturing gas, treating water, or processing sewage is quite another matter. As stated in *Stones v. Plattsmouth Airport Authority,* 193 Neb. 552, 554-55, 228 N.W.2d 129, 131 (1975): "A comprehensive development plan is merely a policy statement that may be implemented by a zoning resolution. . . . It is the zoning resolution which has the force of law. . . . If there is a conflict between a comprehensive plan and a zoning ordinance, the zoning ordinance contains the controlling provisions when questions of a

citizen's property rights are at issue." The zoning ordinance plainly does not authorize the operation of a solid waste disposal area in an "A" Rural and Public Use District, anything in the comprehensive development plan to the contrary notwithstanding.

Next, it is contended that a landfill is an accessory use as a reclamation project on agricultural land. The defendants cite the case of *Schlueter v. County of St. Clair,* 19 Ill. App. 3d 470, 311 N.E.2d 735 (1974), which involved an attempt to utilize a landfill operation to fill an open strip mine area. In allowing such an operation contrary to the plain language of the zoning ordinance, the court stated "that the land in question could not at present be used productively for agricultural purposes but could be reclaimed for productive agricultural use by the operation of a sanitary landfill; that expert scientific evidence established that ground waters and neighboring water wells would not be contaminated or affected by the operation of the landfill; that no appreciable increase in traffic would result; that surrounding property values would not be diminished; that the operation of a landfill could result in the reclamation of the strip-mine property and should appreciate the surrounding property." *Id.* at 473, 311 N.E.2d at 737. We would only point out that the evidence relied upon by the Illinois court is not present in this record. Additionally, the operation of a *commercial* sanitary landfill as a part of a farming operation would hardly be considered an "accessory use" which is "a recognized incidental use" within the meaning of *Kitrell v. Board of Adjustment,* 201 Neb. 130, 266 N.W.2d 724 (1978).

Finally, the defendants claim that the operation of a landfill under a license from the Department of Environmental Control is a "public operation" within the meaning of subsection 5 of article IV of the zoning ordinance. We should add parenthetically that the record does not disclose that the department has actually issued the permit. The exact language

of the ordinance permits "Publicly *owned* or *operated* properties." (Emphasis supplied.) The landfill operation with which we are here concerned is neither publicly owned nor operated. We believe that the plain language of the zoning ordinance does not permit the operation of a commercial solid waste landfill operation, and as a result thereof it is prohibited.

The second assignment of error suggests that because the defendants have contracted to perform certain services for the city of Omaha in the disposal of baled refuse, somehow it is performing a governmental function not subject to zoning control. We do not find it necessary to examine the various authorities, such as *Witzel v. Village of Brainard,* 208 Neb. 231, 302 N.W.2d 723 (1981), in support of such a contention. This was not an issue raised by the pleadings, nor does the record disclose that the case was tried on that theory. The pleadings frame the issues between the parties, and the evidence must be confined to those issues. *Era v. Sapp Bros. GMC, Inc.,* 189 Neb. 366, 202 N.W.2d 750 (1972). We would observe that Neb. Rev. Stat. § 14-102(28) (Reissue 1977) does provide that metropolitan cities "shall have power by *ordinance* . . . to make contracts for the removal or disposal of garbage . . . ." (Emphasis supplied.) However, no such ordinance appears in the record. Other than a passing reference to a contract with the city of Omaha to haul garbage, neither is a written contract to that effect contained within the evidence adduced. The second assignment of error is without merit.

The defendants' final argument concerns itself with the matter of detrimental reliance. That is, they claim that the grant of permission to an occupier of land for a particular use, coupled with the incurrence of substantial expense and obligation in good faith reliance thereon, gives rise to a vested right in such occupier for such use of the land, even though it may be in violation of the zoning ordi-

nances. In support of their argument the defendants cite us to the case of *A. C. Nelsen Enterprises, Inc. v. Cook,* 188 Neb. 184, 195 N.W.2d 759 (1972).

In *Nelsen* the city of Omaha had revoked a certificate of occupancy issued to the plaintiff authorizing it to use certain premises for the retail sale of mobile homes. The property was zoned C-1, which permitted the use of the premises for auto sales, auto laundries, department stores, filling stations, etc., but not for the display and sale of mobile homes. This use was restricted to a C-6 zoning district, which allowed 18 specified uses, all but two of which were also allowed in C-1 districts. The certificate as originally issued recited that the property had been inspected and was suitable for the proposed use, was properly zoned, and complied with all regulations and ordinances. Some 3 months later, Nelsen was advised that the certificate had been issued in error and was void, and that it would have to discontinue that business activity.

The record in *Nelsen* disclosed that before revocation of its permit, the plaintiff had leased the premises for a 3-year term at a total rental of $18,000 and, in addition, had expended approximately $12,000 in preparing the premises for its intended use. In setting aside the revocation of the permit, we said: "In this case, there was no mistake of fact. It is seriously questionable that there was even a mistake of law. The certificate of occupancy was lawfully issued by the municipal officer having authority to issue it and in accordance with the departmental interpretation of the zoning laws which had been in effect for some years. . . . [T]here was substantial good faith expenditure of funds and change of position in reliance upon the certificate issued.

"Where a certificate of occupancy or building permit has been issued lawfully, even though in accordance with a questionable interpretation of the zoning ordinances or regulations, courts have generally held that it may not arbitrarily be revoked, par-

ticularly where the permittee has incurred substantial expenses and liabilities in reliance upon it. . . .

. . . .

"We therefore hold that where a certificate of occupancy has been properly obtained in accordance with zoning statutes and ordinances, it may not be arbitrarily revoked where the certificate holder has incurred substantial expenses, commitments, and obligations in good faith reliance upon the certificate." *Id.* at 186-88, 195 N.W.2d at 761-62.

There are a number of factors which distinguish the present case from *Nelsen.* Here, no permit was ever issued, although it is clear that the Cass County commissioners approved the proposed site for the requested use. However, nothing was granted "in accordance with the . . . interpretation of the zoning laws which had been in effect for some years." As a matter of fact, it was the testimony of the Cass County zoning administrator that the county had no jurisdiction as far as zoning of landfills was concerned and that he had never expressed an opinion to anyone else as to that fact. It was the October 15, 1979, written opinion of the Attorney General in response to a request from the Department of Environmental Control which first notified the county officials that it was the county governing body, not the state department, which was to determine the adequacy of or compliance with local zoning ordinances.

There is evidence in the record that the defendants spent somewhere between $25,000 and $60,000 in engineering and legal fees for the development of this project sometime after approval of the site by the county and prior to the filing of this lawsuit in December of 1979. More importantly, however, is the exact time frame within which the expenditures were made. At one point in the record, when asked if he was saying that $60,428.74 in expenses was incurred subsequent to the board approval and prior to the filing of the lawsuit, Ronald B. Roots answered:

"I'd say it in my way is prior to the lawsuit based on all the approvals I had." At another point in his testimony, Mr. Roots said that he had incurred legal expense of $5,261.20 in legal fees "through these hearings and up to September [sic] 10th when this suit was brought." He also mentioned a commitment on the lease of approximately $6,500 on October 1, 1979, and engineering and soil sampling totaling $25,929.63 as of December 10th, 4 days after this action was filed. Any contract obligation to the city of Omaha was incurred sometime after December of 1980.

In short, the defendants have failed to establish that their expenditure of funds was in good faith, i.e., that it was made before the question of improper zoning was raised. According to a copy of the July 3, 1979, proceedings of the Cass County commissioners, they were, at that time at least, aware that a substantial question existed. In a somewhat similar case we said that "the appellant had not established any vested right to use these premises for the purpose here contended when the change was made. Consequently, we find that the ordinance passed on December 30, 1948, which eliminated the use of the premises for that purpose, lawfully extinguished his permit and any rights he may have had thereunder." *City of Omaha v. Glissmann,* 151 Neb. 895, 904, 39 N.W.2d 828, 834 (1949).

For the foregoing reasons, we find that the judgment of the District Court was correct and is affirmed.

AFFIRMED.

LAMMERS LAND AND CATTLE COMPANY, INC., A NEBRASKA CORPORATION, APPELLANT, V. GERALD HANS ET AL., APPELLEES.

328 N.W.2d 759

Filed January 7, 1983. No. 44494.

1. **Motions to Strike.** It is not the function of a motion to strike to raise the merits of the cause or defense. However, a motion to strike which embodies the substance of an answer may, by waiver of the opposing party, be treated as an answer.
2. **Pleadings.** Under Nebraska statutes, "The pleadings are the written statements by the parties of the facts constituting their respective claims and defenses." Neb. Rev. Stat. § 25-801 (Reissue 1979). "The rules of pleading formerly existing in civil actions are abolished and hereafter the forms of pleading in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this code." Neb. Rev. Stat. § 25-802 (Reissue 1979). "The only pleadings allowed are (1) the petition by the plaintiff; (2) the answer or demurrer by the defendant; (3) the demurrer or reply by the plaintiff; and (4) the demurrer to the reply by the defendant." Neb. Rev. Stat. § 25-803 (Reissue 1979).
3. **Pleadings: Judgments.** The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.
4. **Judgments: Debtors and Creditors: Conveyances.** An action in the form of a creditor's bill or to set aside a conveyance in fraud of creditors cannot generally be founded upon a dormant judgment.
5. **Judgments: Collateral Attack.** A judgment which is not void is not subject to collateral attack, but a void judgment may be attacked at any time in any proceeding.
6. **Real Estate: Judgments: Collateral Attack.** A sale of real estate to satisfy a dormant judgment is, as to the judgment debtor, voidable only and cannot be attacked in collateral proceedings.
7. **Judgments.** When a judgment becomes dormant, the lien is lost as to the judgment debtor's grantee and is not revived by the new execution.
8. **Collateral Estoppel.** The principle of collateral estoppel may bar a party from raising a defense he might otherwise have.

Appeal from the District Court for Cedar County: FRANCIS J. KNEIFL, Judge. Affirmed.

John Thomas of Thomas & Peebles, for appellant.

Robert G. Scoville of Ryan & Scoville, for appellees.

BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and BRODKEY, J., Retired.

CLINTON, J.

This is an action brought in the District Court for Cedar County by Lammers Land and Cattle Company, Inc., to quiet title to 80 acres of land in Cedar County which we will refer to hereafter as "Blackacre." The petition alleged that plaintiff was the owner of Blackacre by virtue of a quitclaim deed from Jerome Lammers dated April 1, 1969, and had been in continuous, notorious, exclusive, and adverse possession of Blackacre since that time except as otherwise alleged in the petition.

We summarize the petition, omitting those matters we deem not necessary to a determination of the issues made on the appeal. The petition alleges that the defendants Mark Hans and Cynthia Hans claim title by virtue of two deeds from the personal representatives of the estates of Mary Lammers and Ignatz Lammers, respectively, and that the above deeds are void because the personal representatives of the two estates acquired their purported titles at execution sales pursuant to judgments which had become dormant by lapse of time. The judgments are identified in the petition as having been entered in case Nos. 5986 and 6017 in the District Court for Cedar County. The petition also alleges that a decree of the District Court for Cedar County in case No. 6147, wherein the above-described conveyance from Jerome Lammers to the plaintiff, Lammers Land and Cattle Company, Inc., was declared null and void as being a fraudulent conveyance to avoid the claims of creditors, was itself void because the underlying judgment lien was dormant at the time the decree was entered.

The defendants Hans and others filed a motion to strike the petition. The substantive portions of the

motion to strike the petition were as follows: "[M]ove the Court to strike the Petition of the Plaintiff herein for the reason that same is a collateral attack on the judgment of this Court in Case No. 6147, the judgment of this Court confirming the sale of the real estate herein involved in Case No. 6017 and in Case No. 5986 in this Court and is a further collateral attack upon the orders of sale of said real estate and the final decrees entered in the Estate of Mary Lammers, deceased, Probate No. 3667 and the Estate of Ignatz A. Lammers, deceased, Probate No. 3931 in the County Court of Cedar County, Nebraska."

The trial court granted the motion to strike and the plaintiff has appealed to this court, making various assignments of error which we restate in the form of issues: (1) May a motion to strike be used to raise the merits of the cause pleaded? (2) Will a dormant judgment support a petition for a creditor's bill or a petition to set aside a conveyance in fraud of creditors? (3) Is a conveyance in fraud of creditors wholly void or is it good as between the parties subject only to the creditor's lien? (4) What is the legal effect of an execution sale of real estate based upon a dormant judgment?

The very brief (except for exhibits) bill of exceptions contains the offer of the defendants' attorney of the court file in case Nos. 6017, 6147, and 5986 from the District Court for Cedar County as well as the court files in the county court of Cedar County containing the proceedings in the estates of Mary Lammers and Ignatz Lammers, respectively. The plaintiff made no objection to the offer of these exhibits which were received in evidence and considered by the court in its ruling on the motion. The plaintiff offered no evidence.

The nature of the issues presented on appeal requires that we first examine the question raised by the use of the "motion to strike." At common law, a motion to strike could be used for many purposes,

including raising the merits of the plaintiff's cause. 71 C.J.S. *Pleading* §§ 450 et seq. (1951). Under our statutory rules of pleading, the purposes of a motion to strike are much more limited. Pleadings pertaining to the substance of the cause or defense are prescribed. "The pleadings are the written statements by the parties of the facts constituting their respective claims and defenses." Neb. Rev. Stat. § 25-801 (Reissue 1979). "The rules of pleading formerly existing in civil actions are abolished and hereafter the forms of pleading in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this code." Neb. Rev. Stat. § 25-802 (Reissue 1979). "The only pleadings allowed are (1) the petition by the plaintiff; (2) the answer or demurrer by the defendant; (3) the demurrer or reply by the plaintiff; and (4) the demurrer to the reply by the defendant." Neb. Rev. Stat. § 25-803 (Reissue 1979). In *Christopherson v. Christopherson,* 177 Neb. 414, 129 N.W.2d 113 (1964), we held that the code of civil procedure covers the proper pleadings in this jurisdiction and that litigants should confine themselves to those pleadings and procedures approved in this jurisdiction. However, defects in pleadings may be waived by failure to make timely objection or raise the objection in an appropriate manner. *Frederick v. Buckminster,* 83 Neb. 135, 119 N.W. 228 (1909) (failure to file demurrer); *Professional Collection Service v. Coble,* 200 Neb. 683, 264 N.W.2d 686 (1978) (failure to object to error in caption); *Gilbert v. Vogler,* 197 Neb. 454, 249 N.W.2d 729 (1977) (failure to move to make the petition more definite and certain).

Both the petition and the "motion to strike" consist largely of legal and factual conclusions. It is apparent that by the motion the defendants sought to plead an affirmative defense of res judicata. In support of that defense the defendants offered the court files previously identified in this opinion. To

each offer the plaintiff stated no objection. The plaintiff then raised the question of whether the issues had been made in a proper manner, that is, by treating the motion to strike as a motion to dismiss. However, both parties proceeded to argue the merits of the issues raised, including plaintiff's claim of dormant judgments and plaintiff's claim of the court's lack of "jurisdiction" to enter a judgment setting aside the conveyance as fraudulent.

We find and hold that by failure to object to the introduction of evidence in support of the motion, the plaintiff waived objections to the form of the "pleadings," as well as to the conclusional nature of its allegations. "The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Neb. Rev. Stat. § 25-853 (Reissue 1979).

We, therefore, proceed to examine the legal sufficiency of the evidence supporting the court's judgment. From the evidence introduced, the court could find the following facts. Ignatz Lammers conveyed Blackacre to his son, Jerome, reserving a life estate in himself. On April 1, 1969, Jerome Lammers, by quitclaim deed, conveyed Blackacre to the plaintiff corporation. Ignatz Lammers thereafter died on December 4, 1969.

In case No. 6017, the personal representative of the estate of Mary Lammers (decedent being the mother of Jerome Lammers and the wife of Ignatz Lammers), on May 22, 1969, obtained a judgment in the District Court for Cedar County, Nebraska, against Jerome Lammers upon a promissory note. This case was appealed to this court and affirmed May 22, 1975. *Becker v. Lammers,* 193 Neb. 839, 229 N.W.2d 557 (1975).

On May 22, 1969, in case No. 5986, Ignatz Lammers obtained a judgment upon a petition which alleged that Jerome Lammers was in possession of certain

land under a contract of purchase and that he was in default, had abandoned the contract and thereafter remained in possession as a tenant, and had failed to account for rents and profits. In that case Ignatz Lammers had obtained a judgment against Jerome Lammers in the sum of $22,929.04. This case was appealed to this court and on May 22, 1975, the judgment was affirmed. *Lammers v. Lammers,* 193 Neb. 836, 229 N.W.2d 555 (1975). June 19, 1969, was the date of the last execution issued in either of the above cases. Immediately after that execution was returned unsatisfied, the personal representative of Mary Lammers' estate brought an action, case No. 6147, to set aside the conveyance of April 1, 1969, as being in fraud of creditors. A judgment setting aside the conveyance and holding it for "naught" was entered November 17, 1977. There apparently was no appeal from that judgment.

Orders of revivor of the two monetary judgments had been entered on December 21, 1978. Thereafter, the sheriff levied upon Blackacre in case Nos. 6017 and 5986, and sold it at a sheriff's sale. The personal representatives of Ignatz Lammers' estate purchased, on behalf of the estate, a three-fifths interest, and the personal representative of Mary Lammers' estate purchased a two-fifths interest therein. The total purchase price was $71,600, being apparently the total amount accumulated on both judgments. Consequently, no equity remained for distribution to either the plaintiff or Jerome Lammers. Jerome Lammers appeared in the confirmation proceeding and objected to confirmation. The court confirmed the sale on June 20, 1979, and on July 25, 1979, the sheriff conveyed Blackacre to the personal representatives of the two estates in the interests previously described. There was no appeal from the orders of revivor or from the order of confirmation.

Two principles of law underlie plaintiff's argument on the merits. The first is that a decree in a

creditor's bill for an action to set aside a conveyance as in fraud of creditors is *void* when the creditor relies upon a judgment which has become dormant before the decree is entered, even though the action was commenced before the judgment became dormant. The plaintiff cites several Nebraska cases which clearly hold that as a general rule a dormant judgment cannot support a creditor's bill. *Flagg v. Flagg,* 39 Neb. 229, 58 N.W. 109 (1894); *Johnson v. Parrotte,* 46 Neb. 51, 64 N.W. 363 (1895); *Cotton v. First Nat. Bank of Superior,* 51 Neb. 751, 71 N.W. 711 (1897); *Predohl v. O'Sullivan,* 59 Neb. 311, 80 N.W. 903 (1899); *Halmes v. Dovey,* 64 Neb. 122, 89 N.W. 631 (1902); *Bank of Miller v. Moore,* 98 Neb. 843, 154 N.W. 731 (1915); *Fisher v. Woodard,* 103 Neb. 253, 170 N.W. 907 (1919); *Rich v. Cooper,* 136 Neb. 463, 286 N.W. 383 (1939). However, in each of the cases cited, the court overturned the judgment in the creditor's bill action on direct appeal; none of the cases cited hold that the judgment is void and thus subject to collateral attack. The rule is that a judgment which is not void is not subject to collateral attack, but a void judgment may be attacked at any time in any proceeding. *Stanton v. Stanton,* 146 Neb. 71, 18 N.W.2d 654 (1945); *Drainage District No. 1 v. Village of Hershey,* 139 Neb. 205, 296 N.W. 879 (1941).

In case No. 6147, the District Court had subject matter jurisdiction and jurisdiction of the parties. Its judgment may have been erroneous because of the dormancy of the underlying judgment; however, it was not void and there was no appeal from that judgment. It therefore bound the parties.

The second legal principle upon which the plaintiff relies is that under the provisions of Neb. Rev. Stat. § 36-401 (Reissue 1978) (since repealed and replaced by the Uniform Fraudulent Conveyance Act, Neb. Rev. Stat. §§ 36-601 et seq. (Cum. Supp. 1982), effective July 19, 1980), the conveyance sought to be set aside is good as between the parties and subject only

to the lien of the creditor who attacks it. Our cases so hold. *United States Nat. Bank of Omaha v. Rupe,* 207 Neb. 131, 296 N.W.2d 474 (1980). Plaintiff asserts that in case No. 6147 the only attacking creditor was Mary Lammers' estate; therefore, the conveyance is good as against the other creditor here involved, Ignatz Lammers' estate. If we accept the plaintiff's premise, the sale to the personal representative of Mary Lammers' estate is still good.

However, even as to the sale to Ignatz Lammers' representatives, the plaintiff must overcome another hurdle which is applicable to both creditors. A sale of real estate to satisfy a dormant judgment is, as to the judgment debtor, voidable only and cannot be attacked in collateral proceedings. *Link v. Connell,* 48 Neb. 574, 67 N.W. 475 (1896); *Harvey v. Godding,* 77 Neb. 289, 109 N.W. 220 (1906); *Becker v. Linton,* 80 Neb. 655, 114 N.W. 928 (1908). It is void as to one who has acquired title from the judgment debtor for consideration before the reviving execution is issued. *Harvey v. Godding, supra.* When the judgment becomes dormant, the lien is lost as to the judgment debtor's grantee and is not revived by the new execution. *Harvey v. Godding, supra;* Neb. Rev. Stat. §§ 25-1515, 25-1305 (Reissue 1979).

Thus, we reach the question of whether the plaintiff can collaterally attack the sale to the personal representatives of Ignatz Lammers' estate. We hold that it cannot. The conveyance which was set aside in case No. 6147 is the same conveyance upon which the plaintiff relies to assert its right to quiet title as against the sale to Mary Lammers' estate. Principles of collateral estoppel apply. Plaintiff was not an innocent purchaser for consideration, as the judgment in the action to set aside the fraudulent conveyance shows. The District Court properly held that the defense of res judicata was applicable and effective.

AFFIRMED.

STATE OF NEBRASKA EX REL. GREGORY A. MERCURIO, JR., APPELLEE, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, APPELLANT.

329 N.W.2d 87

Filed January 7, 1983. No. 44511.

1. **Evidence.** The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith. Neb. Rev. Stat. § 27-1004 (Reissue 1979).
2. _____. Secondary evidence of the contents of a writing, the original of which would have been competent evidence, may be admitted into evidence if it is shown by satisfactory proof that the originals have been lost or destroyed in the absence of bad faith, malice, or fraud.
3. **Colleges and Universities: Evidence: Appeal and Error.** In the absence of some evidence of arbitrary behavior or bad faith, courts will not substitute their judgment for the necessarily discretionary judgment of a school or university as to a student's educational performance.
4. **Mandamus.** Before a writ of mandamus may issue, the relator must show clearly and conclusively that he is entitled to the particular relief requested; that the respondents are legally obligated to act; and the duty to act must be imposed by law and must be clear.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Writ of mandamus vacated. Reversed and dismissed.

Richard R. Wood, General Counsel for the University of Nebraska, and John C. Wiltse, and David L. Buelt of Ellick, Spire & Jones, for appellant.

Paul LaPuzza, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is an action by a student for a writ of mandamus requiring the respondent Board of Regents to remove a failing grade from the transcript of his grade record at the University of Nebraska. The District Court found that the respondent had a

duty to produce for the relator his educational records and had not done so, and issued a peremptory writ of mandamus ordering respondent to remove from the student transcript of the relator the transcribed grade of "F" in the biochemistry course involved. This appeal followed.

In the summer of 1978 Gregory A. Mercurio, Jr., a graduate student, enrolled in a biochemistry course which was conducted as a part of the graduate studies program at the University of Nebraska Medical Center in Omaha. The class consisted of 177 students and was taught by several faculty members. Dr. Ruegamer, chairman of the biochemistry department and chief lecturer in the course, served as overall faculty coordinator. Grades for the course were based upon three multiple-choice examinations. For the three regularly scheduled examinations students recorded their answers to the multiple-choice questions by blackening circles on computer answer sheets. The answer sheets were identified by each student's name and social security number, which he or she wrote on the answer sheet. The answer sheets were then computer graded. The result was a computer printout showing the percentage score each student had received.

Students unable to take a regularly scheduled examination were allowed to take a makeup examination. Approximately six to eight students normally took the makeup examination. A student taking the makeup examination recorded answers directly on the examination booklet, which was then hand graded by a faculty member immediately after the examination had concluded.

Each student's score on each examination for the regularly scheduled or makeup examination was then recorded on his or her separate grade record sheet maintained by the biochemistry department. The score recorded was taken directly from the computer-graded or hand-graded examination booklet. Following the examination, although the re-

sults were not distributed, students could find out their scores by asking the secretary for the biochemistry department.

Mercurio was unable to take the first regularly scheduled examination and, instead, took the makeup examination on August 4, 1978. This examination was hand graded and a score of "F-42" was entered on Mercurio's grade record sheet. Mercurio took the two last regularly scheduled examinations on August 26 and September 6, 1978, respectively. Grades of "56-F" for the August 26 examination and "69.3-C" for the September 6 examination were recorded on Mercurio's grade sheet. Mercurio's average for all three examinations was 56 percent. The biochemistry department grading committee established a grade of 60 percent as the dividing line between a "D" and an "F." That cutoff point was determined without knowledge as to how any particular student had performed in the course. Mercurio received the only failing grade in the class.

On September 15, 1978, Mercurio, having learned of his failing grade, met briefly with Dr. Ruegamer. Mercurio advised Ruegamer that he felt he had made a transposition error in filling in his answers on the answer sheet for the second examination. Dr. Ruegamer agreed to review the matter and meet with Mercurio again.

At the second meeting, Ruegamer reviewed Mercurio's answer sheet for examination No. 2 with him and told Mercurio that he and other members of the department had undertaken an elaborate review of the examination booklet and the materials supplied by Mercurio, and that both Dr. Ruegamer and another faculty member had inspected and hand graded Mercurio's answer sheet and both reached the same 56 percent result as the computer grade. Dr. Ruegamer also explained that the department could not make any grade adjustments based upon a

transposition error after examinations had been handed in and graded.

Mercurio then sought to commence a grade appeals procedure within the university to review his grade in the biochemistry course. He was informed that a new procedure for grade appeals was being written but was not yet completed. The new procedure went into effect in May 1979 and Mercurio filed his appeal. When the appeal was filed, Dr. Ruegamer discovered that Mercurio's answer sheet for examination No. 2 was missing and had apparently been lost at some time after the second meeting between Dr. Ruegamer and Mercurio. That answer sheet has never been found. A hearing was scheduled before the grade appeals committee for September 18, 1979. A dispute arose between Mercurio and the grade appeals committee about the proper procedures to be used at the hearing.

On September 17, 1979, Mercurio filed a petition in the District Court for an alternative writ of mandamus requiring that the respondent Board of Regents conduct the grade appeals hearing in accordance with statutory provisions for administrative agency hearings and that the formal rules of evidence applicable to district court proceedings be followed. At the suggestion of the trial court the parties reached a compromise as to the procedural difficulties and Mercurio's grade appeals hearing was held by the committee in March 1980. The District Court retained jurisdiction to insure that the hearing would comply with the requirements of due process.

In preparing for the grade appeals hearing the parties discovered that all of the makeup examination booklets for the first examination were also missing. Mercurio's answer sheet for the last regular examination was available and was furnished to Mercurio, together with the other educational records except for the two examination booklets. The grade appeals committee heard the appeal despite

the absence of Mercurio's two answer sheets and concluded that Mercurio's failing grade should remain on the transcript. Mercurio appealed to the vice president for academic affairs, who affirmed the decision of the grade appeals committee.

On October 31, 1980, Mercurio filed an amended petition in the District Court seeking an alternative writ of mandamus requiring that the respondent remove the "F" from his student transcript. Mercurio alleged that he was entitled to inspect his educational record and that respondent was obligated to produce all materials used in determining Mercurio's final grade, and that respondent failed to produce his answer sheets for examination Nos. 1 and 2 and that the absence of those records prohibited him from successfully appealing his grade or challenging the educational records, thus depriving him of due process of law.

Show cause hearings were held before the District Court on November 20, 1980, and again on February 25, 1981. The court received into evidence Mercurio's grade sheet containing his scores for all three examinations; a computer printout listing all of the students' scores for examination No. 2, including Mercurio's 56 percent score; the audio tape from the grade appeals hearing; and copies of the grade appeals procedure adopted by the university. Various witnesses testified to the facts outlined above and a faculty member testified as to his knowledge that Mercurio had received a 42 percent grade for makeup examination No. 1.

Mercurio testified that he had called the departmental secretary shortly after taking the makeup examination No. 1 and was informed of his grade, but that he did not contact the department to find out his grade after examination No. 2. He also testified that he went to the departmental office after examination No. 3 and received his score on that test. The departmental secretary also testified that she recorded Mercurio's scores on all three examina-

tions directly from his answer sheets to his grade sheet.

The trial court held that under the federal educational rights and privacy act, 20 U.S.C. 1232(g) (1976), and regulations thereunder (45 C.F.R. § 99 (1981)), and paragraph 5.3 of the bylaws of the Board of Regents and the grade appeals procedure adopted thereunder, the board had a duty to produce Mercurio's educational records for his review and use at the hearings. The court also determined that the federal regulations prohibit destruction of such educational records where there is outstanding a request for review, and that the board had a duty to produce the documents pertaining to examination Nos. 1 and 2.

The court concluded that there was no satisfactory explanation by the board as to why the documents could not be produced and entered a peremptory writ of mandamus requiring the board to remove from the student transcript of Mercurio the transcribed grade of "F" in the course entitled Biochemistry 510/810. The trial court refused supersedeas as untimely. The grade was expunged in compliance with the writ and this appeal followed.

On appeal Mercurio contends, as the trial court found, that because the board could not produce two of Mercurio's three examination papers, the board must expunge from the record his failing grade in a biochemistry course. The argument is that because the university had a duty to grant Mercurio the right to inspect and review his educational records and also was obligated not to destroy records when there was an outstanding request to inspect and review them, therefore the failure of the university to produce the two specific records entitled Mercurio to have his grade expunged. We disagree.

The federal educational rights and privacy act and regulations thereunder, together with the bylaws of the University of Nebraska and the grade appeals procedure of the University of Nebraska Medical

Center, grant to a student the right to inspect and review his educational records, and prohibit the destruction of records when there is an outstanding request to inspect and review them. They also provide for a hearing in cases where a student wishes to challenge the accuracy of his educational records.

The basic problem with Mercurio's contention is that it treats the original document as the only admissible evidence of the contents of the document. The argument also assumes, in spite of the evidence, that the absence of the document was the result of bad faith, malice, or fraud on the part of the university. There is no evidence of bad faith, malice, or fraud on the part of the university, the faculty, or the board in this record.

The only real issue in this case is whether Mercurio's grades on the two missing examination papers and his consequent failing grade for the course were accurate or inaccurate. Neb. Rev. Stat. § 27-1004 (Reissue 1979) provides in relevant part: "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

"(1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith . . . ."

Secondary evidence of the contents of a writing is generally admissible where it is shown that the original writing has been lost or destroyed. This state has followed the general rule. In *In re Estate of Baker,* 144 Neb. 797, 806, 14 N.W.2d 585, 590-91 (1944), this court said: "Of course, the rule is that secondary evidence of the contents of a letter or telegram, the original of which would have been competent evidence, cannot be given unless some legal excuse is shown for failing to produce the original. If it is shown by satisfactory proof that the originals have been lost or destroyed one of the principal objections to secondary evidence at once disappears and such evidence becomes admissible. Their loss

or destruction need not be proved beyond the possibility of mistake as the court is vested with a judicial discretion in the matter and it is enough if the testimony satisfies the court of the fact with reasonable certainty. If they are accidentally destroyed by a party without fault secondary evidence may be given of their contents, and even if their destruction is voluntary secondary evidence of their contents may be given if the circumstances accompanying the act are free from suspicion of intent to defraud and consistent with an honest purpose."

In the case at bar the testimony of various faculty and administrative personnel was uncontradicted that they had examined the missing documents, hand graded them, and that that grade was directly transferred to the grade record sheet of Mercurio. There is simply no evidence of bad faith, malice, or fraud. If we accepted Mercurio's argument, any student who received a failing grade in any course who discovered one of his examination papers was missing from the university records could have his grade expunged because the record had been lost, misplaced, or destroyed. The secondary evidence as to the missing documents in the present case was given by witnesses under oath and subject to the rigors of cross-examination, and it was more than sufficient to establish the accuracy and validity of the grading of the missing documents.

In the absence of some evidence of arbitrary behavior or bad faith, courts will not substitute their judgment for the necessarily discretionary judgment of a school or university as to a student's educational performance. See, *Depperman v. University of Kentucky,* 371 F. Supp. 73 (E.D. Ky. 1974); *Greenhill v. Bailey,* 378 F. Supp. 632 (S.D. Iowa 1974), *reversed on other grounds* 519 F.2d 5 (8th Cir. 1975); *Connelly v. University of Vermont and State Agr. Col.,* 244 F. Supp. 156 (D. Vt. 1965).

Before a writ of mandamus may issue, the relator must show clearly and conclusively that he is enti-

tled to the particular relief requested; that the respondents are legally obligated to act; and the duty to act must be imposed by law and must be clear. *Singleton v. Kimball County Board of Commissioners,* 203 Neb. 429, 279 N.W.2d 112 (1979); *State ex rel. Newbold v. County of Buffalo,* 202 Neb. 813, 277 N.W.2d 246 (1979).

In the present case the relator has failed to show that he is clearly and conclusively entitled to the particular relief requested and granted and that the respondent board was legally obligated to act. Although we do not determine whether Mercurio had an adequate remedy at law, mandamus was not appropriately granted on the evidence in this case. The writ of mandamus is vacated. The judgment is reversed and the cause of action dismissed.

WRIT OF MANDAMUS VACATED.
REVERSED AND DISMISSED.

CAPORALE, J., not participating.

DARREL W. SIMONDS, APPELLEE, V. BOARD OF EXAMINERS FOR LAND SURVEYORS ET AL., APPELLANTS.
329 N.W.2d 92

Filed January 7, 1983. No. 81-638.

1. **Administrative Law: Appeal and Error.** Where factfindings under criteria in Neb. Rev. Stat. § 84-917(6)(e) (Reissue 1981) are involved, we review the decision of the District Court only to determine that it and the board have applied the proper criteria, and it is in this sense that we review de novo.
2. _____: _____. The substantial evidence standard of review of decisions of administrative agencies requires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably find facts as it did.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed as modified.

Paul L. Douglas, Attorney General, and Frank J. Hutfless, for appellants.

James E. Gordon of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon, for appellee.

BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and BRODKEY, J., Retired.

PER CURIAM.

Defendants, the Board of Examiners for Land Surveyors and James L. Brown (Brown), appeal the judgment of the District Court of Lancaster County that reversed the board's order revoking the surveying license of the plaintiff, Darrel W. Simonds.

Simonds is a registered land surveyor with 34 years' experience. He was part-time county surveyor for Johnson County and Seward County. Neb. Rev. Stat. § 23-1901.01 (Reissue 1977).

The Board of Examiners for Land Surveyors consists of five registered land surveyors. Brown is the Nebraska State Surveyor, appointed by the Board of Educational Lands and Funds, Neb. Rev. Stat. § 84-407 (Reissue 1981), and by statute he is the ex officio secretary to defendant board, Neb. Rev. Stat. § 81-8,110.03 (Reissue 1981).

In 1979 Brown conducted official investigations concerning surveying work and records of Simonds in Johnson and Seward Counties, and each county was assessed fees, Johnson County $6,262.61 and Seward County $944.32, payable to the State Treasurer for the Surveyors' Cash Fund, Neb. Rev. Stat. § 84-409 (Reissue 1981). In 1980 formal charges were brought against Simonds by the board, pursuant to Neb. Rev. Stat. § 81-8,123 (Reissue 1981): "The board may, upon its own motion, and shall, upon the sworn complaint in writing of any person, investigate the actions of any land surveyor. It shall have the power to revoke or suspend any registration under the provisions of sections 81-8,108 to 81-8,127, when the land surveyor has been found guilty of any

of the following practices: (1) Fraud or deceit in obtaining a registration; (2) negligence or incompetency in the performance of his duties; or (3) misconduct in the performance of his duties." No standards for "incompetency," "negligence," or "misconduct" are included in the statute.

Incompetency refers to a demonstrated lack of proficiency, skill, or ability to perform the professional duties and functions of a licensed land surveyor. Misconduct of a land surveyor is that conduct that violates those standards of professional behavior which have been established through professional experience. See *Vivian v. Examining Board of Architects,* 61 Wis. 2d 627, 213 N.W.2d 359 (1974). A land surveyor "must exercise that degree of care which a surveyor or civil engineer of ordinary skill and prudence would exercise under similar circumstances . . . ." 58 Am. Jur. 2d *Occupations, Trades, and Professions* § 78 at 962 (1971).

Notice was given to Simonds for hearing before examiner Joseph H. Badami, attorney, Lincoln, Nebraska. The notice contained detailed charges that we summarize: *In Seward County* Simonds negligently and incompetently, in 1(a), located a ¼ corner; in 1(b), determined a ¼ corner 26.6 feet west of the true position; in 1(c), located a 1/16 corner 9.4 feet east of the true position; in 1(d), located a 1/16 corner 3.2 feet west of the true position; and, in 1(e), failed to file survey records showing corners found and set as required by Neb. Rev. Stat. § 81-8,122.01 (Reissue 1981). *In Johnson County* Simonds negligently and incompetently, in 2(a), located ¼ corners; in 2(b), failed to perpetuate corners, contrary to Neb. Rev. Stat. §§ 23-1907 and 23-1908 (Reissue 1977); and, in 2(c), failed to designate corners, contrary to § 81-8,122.01. Simonds, in 3, was guilty of misconduct, having filed a record of a found corner that was later changed to show a temporary corner.

A 2-day hearing was had, attended by Simonds. The examiner filed the evidence with the board and

his full report summarizing the evidence, finding evidence of errors made by Simonds, some corrected, some explained, and some unexplained, but in his opinion none so substantial as to warrant a finding of either negligence or incompetence; rather, that there was a disagreement between two surveyors. He recommended a reprimand.

On January 19, 1981, the board met in regular formal session, after notice. Simonds did not attend the meeting. Brown was present at the hearing in his official capacity as ex officio secretary. The board considered the Simonds' proceedings first in executive session with Brown present, and then in formal session it made findings that Simonds was guilty of each charge except 1(c); however, item 1(b) was changed to show "east" of the true position instead of "west," as was contained in the original charge. The board ordered revocation of Simonds' surveyor's certification. Notice of these findings and the board's order was sent to Simonds over Brown's signature as secretary; later, similar findings and notice were executed over the signatures of the board in compliance with Neb. Rev. Stat. § 81-8,125 (Reissue 1981).

Simonds filed his petition on appeal, Neb. Rev. Stat. § 84-917 (Reissue 1981), alleging his substantial rights had been prejudiced because the order (1) was not supported by competent, material, and substantial evidence; (2) was arbitrary and capricious; (3) was contrary to the evidence and the findings of the hearing officer; and (4) was contrary to constitutional due process.

Section 84-917(6) provides review by the District Court on the record: "The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the agency decision is: (a) In violation of constitutional provisions; . . . (c) Made upon unlawful procedure; . . .

(e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review . . . ."

Upon trial, the District Court vacated the order of the board and reinstated Simonds' registration certificate upon findings that the substantial rights of Simonds had been prejudiced and that the board's decision was not supported by competent, material, and substantial evidence.

Defendants appeal, assigning general error that the decision was contrary to the law and the evidence. "[W]here fact findings under criteria [§ 84-917](6)(e) are involved, we review the decision of the District Court only to determine that it and the commission have applied the proper criteria, and it is in this sense that we review de novo." *The 20's, Inc. v. Nebraska Liquor Control Commission,* 190 Neb. 761, 765, 212 N.W.2d 344, 347 (1973).

The establishment and perpetuation of reliable land corners, monuments, plats, and surveys, together with their official records, are historically of public concern, necessary for the orderly transaction of public affairs and business, and require high standards of care on the part of qualified surveyors.

Simonds' petition and the record present criteria other than substantial evidence, including § 84-917(6)(a), violation of constitutional provisions, and § 84-917(6)(c), unlawful procedures, in conducting hearings and in making findings of fact.

The substantial evidence standard of review of decisions of administrative agencies requires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably find facts as it did. See, *Winship v. Brewer School Committee,* 390 A.2d 1089 (Me. 1978); *United States v. Bianchi & Co.,* 373 U.S. 709, 83 S. Ct. 1409, 10 L. Ed. 2d 652 (1963).

Brown's testimony generally supports the specific factual allegations made against Simonds, including

measurements; irregular location of monuments and corners; inaccurate corners; temporary corners shown as found corners, contrary to statutes; failure to sign and file tie cards in the county records (§ 81-8,122.01); and contemporary markers shown as historical markers.

Simonds filed a detailed written response to each charge, supplemented by plats, records, and drawings, explaining his acts and surveying procedures. This response, and his testimony, was that the measurements, established corners, and monuments were properly fixed and determined, considering the existing county records, his statutory duty to correct county records, original U.S. Government surveys, general statutory county surveyor duties (§ 23-1907), information known to him, and accepted surveying procedures; that Brown's records and procedures were incorrect; and that the tie cards in question were only temporary and the failure to sign and identify them was a "typographical" error.

Francis Rotter, Cass County surveyor, and Henry Graff, Chief Deputy Lancaster County surveyor, testified for plaintiff that they generally approved Simonds' surveying procedures, including his correction of county records, except the use of temporary tie cards.

The board can utilize its experience and technical knowledge in evaluating the evidence. Neb. Rev. Stat. § 84-914(5) (Reissue 1981). Applying the rule in *The 20's, Inc., supra,* it is for the board to weigh the evidence and accept one version thereof. Our review shows that there was substantial evidence to support the board's findings and conclusions.

Simonds argues that the board's order did not make findings of fact required by Neb. Rev. Stat. § 84-915 (Reissue 1981): "Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The find-

ings of fact shall consist of a *concise statement* of the conclusions upon each contested issue of fact. . . ." (Emphasis supplied.)

Here, the findings of fact were a restatement of each original charge made against Simonds, followed by the word "Guilty." At most, the objection to those findings is a matter of form. "It is not required that the findings be so specifically made as to set out the items of evidence upon which they are based . . . ." *Doran v. Johns,* 186 Neb. 321, 324, 182 N.W.2d 900, 903 (1971). The findings were concise statements relating to the statutory unauthorized practice of either negligence, incompetence, or misconduct in the performance of his duties. § 81-8,123.

Simonds further contends that Brown's full participation in the board's adjudication process was unlawful and prejudicial to him.

"The combination in the same person of the functions of investigation or advocacy and the function of deciding is a recognized evil . . . ." 2 Am. Jur. 2d *Administrative Law* § 412 at 223 (1962). That is not to say that such a combination is of itself a denial of due process; rather, all of the existing circumstances must be considered to determine if the procedures provided did assure fundamental principles of justice and fair play. The federal Administrative Procedure Act generally prohibits an employee engaged in an investigative function from participating in the decision process. 5 U.S.C. § 554(d) (1976).

State Surveyor Brown had certain statutory prehearing duties to make investigations, surveys, and reports. Those duties, coupled with his testimony in the revocation hearing, present a question of preserving the impartial nature of the proceedings. Under the record here, those described duties and testimony were impartially performed in an open adversary proceeding, and there was no prejudice. See 2 Am. Jur. 2d, *supra* § 412.

There were further post hearing circumstances

that are suspect. At the January 19 hearing of the board, Brown was present at all times; he participated in the proceedings, although he did abstain from voting. The official minutes prepared by Brown show that it commenced at 9:22 a.m.; present were the five board members, Brown's secretary, and the board's attorney. Simonds was not present. Brown moved the board adjourn to executive session. Neb. Rev. Stat. § 84-1410 (Reissue 1981). The board returned to formal session at 12:15 p.m., and Brown announced, "Because I have been a witness . . . I as State Surveyor and Ex-Officio Secretary of the Board withdraw from participation in the vote of the Board to determine the guilt or innocence of Darrel W. Simonds and further, I shall take no part in the determination of the Board's action against Darrel W. Simonds, if he is found guilty of the charges brought against him."

The official taped record shows that Brown made the nonparticipation statement prior to the executive session. Thereafter, the taped record is silent as to any board proceedings until 2 p.m., when other routine business was conducted.

Brown's statement that he would not participate in the voting was a recognition of the board's duty to provide a fair and impartial hearing and that his further participation in the proceedings tended to deny such. However, Brown did continue his presence throughout all of the adjudicative proceedings, refraining only from voting. The record is silent as to his participation, if any, in the executive session proceedings.

The consideration of Simonds' case in closed executive session apparently was contrary to § 84-1410, since there is no showing of either necessity or the reasons enumerated in (1)(a), (b), or (c).

There is an accumulation of unlawful procedural circumstances here that affects the substantial rights of Simonds. First, Brown conducted the investigations, prepared the revocation charges, and

testified in support of those charges. Standing alone, those circumstances were not prejudicial to Simonds. Next, Brown was present and participated in all of the formal adjudicative session of the board, except voting, when the charges against Simonds were considered, evidence reviewed, findings and decision made, and order entered. Brown was present during the extended executive session wherein the board considered Simonds' case, apparently contrary to the purposes and provisions of § 84-1410. The official decision and order of revocation made by the board was prepared by Brown.

The participation of Brown in his official capacity at the January 19 hearing and his presence during the executive session of the board were irregularities that tended to prejudice the substantial rights of Simonds. Under other circumstances it might have required a finding that the proceeding was fundamentally unfair to Simonds. Considering the record as a whole, we conclude that the circumstances in this case do not require that the order of the board be reversed for that reason.

After a full review of the record, we modify the judgment of the District Court vacating the order of revocation. The judgment is modified to provide for the suspension of Simonds' certificate of registration for a period of 30 days, commencing upon the filing of the mandate in the District Court, and the judgment as modified is affirmed.

AFFIRMED AS MODIFIED.

BRODKEY, J., Retired, concurs in the result.

JOAN V. HEINZMAN, AN INDIVIDUAL, APPELLANT, V. COUNTY OF HALL, APPELLEE.
JOAN V. HEINZMAN, AN INDIVIDUAL, APPELLANT, V. CITY OF GRAND ISLAND, APPELLEE.

328 N.W.2d 764

Filed January 7, 1983. Nos. 81-692, 81-693.

1. **Pleadings: Appeal and Error.** The court must accept the facts as set forth in the petition and may not notice or consider extrinsic matters in determining whether a pleading states a cause of action.
2. **Public Officers and Employees.** Where the salary or compensation of a public officer is fixed by statute, no judicial action in that respect is required of the board of county commissioners and, in such a case, the provisions of Neb. Rev. Stat. § 23-135 (Reissue 1977) do not apply.
3. **Termination of Employment: Constitutional Law.** Under the U.S. Constitution, one must first establish a property interest in a position in order to establish procedural due process rights in a dismissal from employment.
4. _____: _____. The establishment of a property interest in employment requires a legitimate claim of entitlement to it that stems from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.
5. **Termination of Employment: Public Officers and Employees.** Under Nebraska law it is a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer.
6. _____: _____. Where a person is employed during the pleasure of two governmental agencies, either one may discharge unless otherwise specified in the contract of employment.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

LeRoy W. Sievers and Arlen W. Langvardt of Peterson, Bowman & Johanns, for appellant.

Stephen L. Von Riesen, Hall County Attorney, and Greg Thomas, for appellee Hall County.

Keith Sinor, City Attorney, for appellee City of Grand Island.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

WHITE, J.

Appellant, Joan V. Heinzman, files these appeals from the orders of the District Court for Hall County, Nebraska, sustaining the demurrers to her amended petitions. The cases have been consolidated for purposes of this appeal.

Assuming all well-pleaded facts, as distinguished from mere conclusions, as true, the following may fairly be gathered from the allegations of the petitions.

In May 1967, pursuant to a joint resolution of the county board of supervisors for Hall County and the city council of Grand Island, Nebraska, Heinzman was appointed civil defense director for Hall County and the City of Grand Island. The joint resolution is attached to the petitions and incorporated by reference in the petitions and provides in part: "WHEREAS, it is the desire and intent of the (Board of County Supervisors) for Hall County and/or the (City Council) of Grand Island, Nebraska, to establish a City-County Civil Defense Organization.

"NOW, THEREFORE, BE IT RESOLVED BY SAID BOARD OF SUPERVISORS AND (CITY COUNCIL):

"1. That there is hereby established within said City-County a Joint Organization for Civil Defense to be operated in conformity with the Nebraska Civil Defense Act of 1951, as amended. This organization will be known as the Grand Island-Hall County Civil Defense Agency.

"2. That, reposing great confidence in his integrity and ability Mrs. Joan V. Heinzman, whose address is . . . is hereby appointed director of Civil Defense for said City-County organization, to serve during the pleasure of this City Council and Board of Supervisors or until a successor is duly appointed.

"3. That Hall County Treasurer will be responsible for the receipt and disbursement of all Civil Defense Funds, where funds are provided for Civil Defense purposes."

On May 29, 1980, a determination was made by the county board to terminate the employment of Heinzman. Heinzman was paid for the month of May 1980 and not thereafter.

A claim was submitted by Heinzman to the Hall County Board of Supervisors on August 27, 1980, for salary for the months of June, July, and August 1980, and for alleged "Employment benefits including unused vacation, compensatory time, and sick leave as of August 31, 1980." No provision of a contract of employment that included specific benefits for those last items was alleged by Heinzman.

The City of Grand Island did not take concurrent action in terminating Heinzman's employment. Heinzman was not notified before the fact of the termination or afforded an opportunity to be heard.

Heinzman further alleges that she had a property interest in her job, the firing was not in good faith, and it was a violation of her fourteenth amendment rights.

The case raises a number of interesting questions, only a few of which were briefed by the parties. (1) Is there any factual basis alleged for the recovery of fringe benefits by Heinzman? (2) Was the claim against the county filed within the statutory 90-day period prescribed by Neb. Rev. Stat. § 23-135 (Reissue 1977)? (3) Did Heinzman satisfactorily allege a continued expectation of employment such as to give rise to the level of a constitutional right to notice and hearing before termination? (4) Was the employment lawfully terminated by the county board without the assent of the city council of Grand Island?

In considering the first issue, we are unable to find in the records any allegations of a contract, oral or written, dealing with employment benefits. The petitions requesting those benefits were clearly insufficient. It seems elementary that if recovery is sought on a contract of employment, the terms of the contract must be alleged. The court must ac-

cept the facts as set forth in the petition and may not notice or consider extrinsic matters in determining whether a pleading states a cause of action. *Tennyson v. Werthman,* 167 Neb. 208, 92 N.W.2d 559 (1958). The contention of appellant is without merit on this point.

The second issue involves the time limit for filing a claim under § 23-135. The appellant maintains that under a term of continuing service, such as her position as civil defense director, it is unreasonable to require her to continuously file claims before the expiration of each 90-day period in order to maintain an ongoing claim for accrued salary after her termination.

We find it unnecessary to reach this issue because we do not find § 23-135 to be applicable to the facts of this case. In a somewhat similar case, this court in *McCollough v. County of Douglas,* 150 Neb. 389, 34 N.W.2d 654 (1948), held that the claim of a District Court deputy clerk for salary arrearages did not arise ex contractu and therefore the statutory time limitation of § 23-135 did not apply.

In the *McCollough* case at 394, 34 N.W.2d at 658, we cited *Mitchell v. County of Clay,* 69 Neb. 779, 96 N.W. 673 (1903), for the proposition that " 'County Commissioners act quasi judicially in passing upon claims against the county, whenever their action is not merely a formal prerequisite to the issuance of a warrant, but involves the determination of questions of fact, upon evidence or the exercise of discretion in ascertaining or fixing the amount to be allowed.' " This court also cited *Hansen v. Cheyenne County,* 139 Neb. 484, 297 N.W. 902 (1941), which held that where the salary or compensation of a public officer is fixed by statute, no judicial action in that respect is required of the board of county commissioners and that, in such a case, the provisions of § 23-135 do not apply.

With regard to appellant's claim under the fourteenth amendment of the U.S. Constitution, one must

first establish a property interest in a position in order to establish procedural due process rights in a dismissal from employment. *Board of Regents v. Roth,* 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Perry v. Sindermann,* 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

The establishment of a property interest in employment requires a "legitimate claim of entitlement to it" that stems "from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents, supra* at 577.

Under Nebraska law it is a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer. *Nebraska Dept. of Roads Employees Assn. v. Department of Roads,* 189 Neb. 754, 205 N.W.2d 110 (1973); *Nevels v. State,* 205 Neb. 642, 289 N.W.2d 511 (1980). In the absence of an employment contract for a fixed term, an employee is terminable at will. *Stewart v. North Side Produce Co.,* 197 Neb. 245, 248 N.W.2d 37 (1976). The appellant has failed to allege facts which establish that she was deprived of a right to a hearing prior to her termination under the fourteenth amendment of the U.S. Constitution or any state law. Other than the bare allegation of a "property right" in the continuation of employment, Heinzman alleged no facts which give rise to a constitutionally protected right of notice and hearing. The joint resolution under which appellant was employed stated merely that she was "to serve during the pleasure of this City Council and Board of Supervisors or until a successor is duly appointed," and established no expectations that employment would be continued longer than the hiring parties wished it to continue. "At pleasure" in employment contracts has been interpreted to mean that the hiring authority has absolute power to remove. *Stebbins v. Police Commissioners,* 196 Mass. 365, 82 N.E. 42 (1907).

Counsel at oral argument asserted that an understanding had existed between the county board and Heinzman which gave rise to the continued expectation. We have searched the amended petitions and if there were such representations they were not alleged. The contention of the appellant is without merit.

The only remaining question dispositive of these appeals is whether the concurrent act of the city council was necessary in order for the discharge of Heinzman to be effective.

The establishment of a joint civil defense agency is authorized by Neb. Rev. Stat. § 81-829.46 (Reissue 1981) and by the provisions of the Interlocal Cooperation Act, Neb. Rev. Stat. §§ 23-2201 et seq. (Reissue 1977).

Section 81-829.46 provides that each county or city "shall be within the jurisdiction of . . . a local or *interjurisdictional* civil defense organization which is headed by a director . . . ." (Emphasis supplied.)

The accomplishment of the formation of an interjurisdictional civil defense agency is governed by § 23-2204. The agreement shall provide: "(3) . . . (a) Its duration; (b) The precise organization, composition, and nature of any separate legal or administrative entity created thereby together with the powers delegated thereto, provided such entity may be legally created; (c) Its purpose or purposes; (d) The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget therefor; (e) The permissible method or methods to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination . . . ."

The agreement provided that the employment was "during the pleasure" of Hall County and the City of Grand Island.

It is a reasonable construction of the joint resolution that either of the parties may discharge, and

the discharge is effective as to both hiring entities. To hold otherwise would be to subject the members of one of the subdivisions to the complete will of the members of the other body, an intention not discernible from the words of the resolution or from the Interlocal Cooperation Act.

The appellant was lawfully terminated in May 1980.

The decision of the trial court is correct and is affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. ALLEN DEAN MILLER, APPELLANT.

328 N.W.2d 769

Filed January 7, 1983. No. 81-698.

1. **Implied Consent Law: Blood, Breath, and Urine Tests.** Neb. Rev. Stat. § 39-669.09 (Reissue 1978) does not require the officer to inform the person to be tested of his privilege to request an independent test.
2. **Criminal Law: Evidence.** In a criminal prosecution any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony.
3. **Evidence: Witnesses.** A hypothetical question is not improper simply because it includes only a part of the facts testified to.
4. **Motor Vehicles: Expert Witnesses.** An opinion of vehicular speed is proper, provided a sufficient foundation is laid to show the expertise of the witness, as well as specific knowledge of the underlying facts to deal with the question in issue.
5. **Implied Consent Law: Blood, Breath, and Urine Tests.** The use of an anticoagulant as a preservative for a blood sample is not a foundational requirement for the admission of evidence relating to test results, and the failure to use an anticoagulant goes only to the weight and credibility of the evidence.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The defendant was convicted of motor vehicle homicide and sentenced to imprisonment for 1½ to 5 years. He has appealed and assigns as error the admission into evidence of the results of a blood test made following the accident, the admission of rebuttal testimony offered by the State, and the instructions to the jury.

The record shows that at about 10:30 p.m. on April 30, 1981, the defendant was operating a motorcycle in a westbound direction on Maple Street in Omaha. At the intersection of 63rd and Maple Streets, the motorcycle collided with a pedestrian, Marguerite Bostrom. Mrs. Bostrom suffered severe head and internal injuries and was pronounced dead at Immanuel Hospital.

Miller was also injured in the accident and was taken to the Methodist Hospital emergency room where he was questioned by a police officer, who detected alcohol on Miller's breath. Miller was then arrested for operating a motor vehicle while under the influence of intoxicating liquor. The officer read Miller the Nebraska implied consent advisory form and advised him of his *Miranda* rights. The officer also advised Miller that he could choose either a blood or a urine test to determine the level of alcohol in his system. Miller chose a blood test.

A hospital technician was directed to draw a blood sample, and the sample was taken by the officer to police headquarters and refrigerated. The time elapsed between the taking of the sample and refrigeration was about 1½ hours. The chemist who tested the sample testified that on May 4, 1981, a blood alcohol level of 0.14 percent was measured. A retest on May 18, 1981, showed the level to be 0.15

percent. The chemist indicated that there was not a true deviation between the test results.

The evidence as to the blood test was received over objection at the trial. The defendant contends the evidence was not admissible because (1) the defendant was not advised that he could choose to have a separate test performed by the physician of his choosing and (2) the test as performed did not meet Department of Health regulations, in that no anticoagulant or preservative was present in the sample and that the chemist failed to use potassium carbonate in the testing.

Neb. Rev. Stat. § 39-669.09 (Reissue 1978) provides in part: "The law enforcement officer who requires a chemical blood, breath, or urine test pursuant to section 39-669.08 may direct whether the test shall be of blood, breath, or urine; *Provided,* that when the officer directs that the test shall be of a person's blood or urine, such person may choose whether the test shall be of his blood or urine. The person tested shall be permitted to have a physician of his choice evaluate his condition and perform or have performed whatever laboratory tests he deems appropriate in addition to and following the test administered at the direction of the law enforcement officer."

In *Zadina v. Weedlun,* 187 Neb. 361, 190 N.W.2d 857 (1971), we held this statute does not require the officer to inform the person to be tested of his privilege to request an independent test. See, also, *State v. Wahrman,* 199 Neb. 337, 258 N.W.2d 818 (1977); *State v. Sommers,* 201 Neb. 809, 272 N.W.2d 367 (1978); *State v. Brittain,* 212 Neb. 686, 325 N.W.2d 141 (1982).

Rule 3 of the rules and regulations of the state Health Department, relating to analyses for the determination of the alcohol content of body fluids and the breath under the driving-while-intoxicated law, provides that blood samples must be collected in a container having an anticoagulant-preservative in it.

It is undisputed that the defendant's blood was collected in a tube which did not contain such a substance. Expert testimony was admitted through the chemist to the effect that the presence of the preservative inhibits yeast growth, which in turn might affect the alcohol content. On this particular sample, however, a test was performed and it revealed no presence of yeast. The expert witness further testified that in locally drawn and tested samples, refrigeration of the sample was more important than a preservative in guaranteeing reliable test results. A pathologist testified that whether the preservative was present or not made no difference in the test results.

In *State v. Fox,* 177 Neb. 238, 128 N.W.2d 576 (1964), we held that the effect of an improper amount of anticoagulant on the test results goes only to the weight and credibility of the evidence.

Rule 3 also regulates the types of methods approved for measuring blood alcohol. An approved method is termed direct injection into a gas chromatograph. This method requires the injection of an internal standard, but the addition of potassium carbonate is not required. The defendant argues that the tester's failure to use potassium carbonate while using a gas chromatograph violated rule 3.

The chemist called by the State testified that he used the method in which an internal standard was injected into the gas chromatograph. The evidence does not show noncompliance with the prescribed method.

We find no error in the admission into evidence of the results of the blood test.

On rebuttal the State was allowed to introduce testimony of an accident reconstruction expert indicating that the defendant's speed at the time of the accident was 70 m.p.h. The defendant argues this evidence was irrelevant and there was insufficient foundation for the testimony.

The manner in which the defendant operated his

vehicle was relevant to the charge. In *State v. Hilker,* 210 Neb. 810, 317 N.W.2d 82 (1982), we held that a violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982) can be proven in any of three ways, among them operating a motor vehicle "while under the influence of alcoholic liquor." This phrase was defined in *O'Neill v. Henke,* 167 Neb. 631, 638, 94 N.W.2d 322, 329 (1959), as: " ' "[A] person is under the influence of alcoholic liquor if such person is under such influence of intoxicating liquor to such an extent as to have lost to an appreciable degree the normal control of his body or mental faculties, and to the extent that there is an impairment of the capacity to think and act correctly and efficiently." ' "

The defendant had introduced testimony as to the speed of the motorcycle. " 'In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony.' " *Lipscomb v. State,* 162 Neb. 417, 420, 76 N.W.2d 399, 401-02 (1956). See, also, *State v. Pratt,* 197 Neb. 382, 249 N.W.2d 495 (1977).

The witness was experienced in accident reconstruction. He testified in response to a hypothetical question based on the following factors: (1) weight of the cycle and victim, (2) a test drive over the area, (3) review of the police and autopsy reports, (4) photographs taken, (5) weather and road conditions, and (6) resting place of the victim. This information was supported by the testimony of the witness and other witnesses.

In *Hawkins Constr. Co. v. Matthews Co., Inc.,* 190 Neb. 546, 558-59, 209 N.W.2d 643, 651 (1973), we stated: "In an overlapping argument the defendants assail the form of the hypothetical question and particularly because it omitted the testimony of Pechar, who observed the collapse. A hypothetical question should fairly reflect the proven facts. Great latitude is allowed the trial judge in ruling on admissibility of such a question. A hypothetical

question is not improper simply because it includes only a part of the facts testified to. Landis & Schick v. Watts, 84 Neb. 671, 121 N.W. 980. An expert witness in giving an opinion has a right to confine the facts that he recites to those which are believed to be true, or which are believed to be material to the issue. The question of what facts are relevant to the determination is one of the basic ones upon which experts in any given field may differ."

The particular issue of expert testimony of vehicular speed was dealt with in *Herman v. Lee,* 210 Neb. 563, 570-71, 316 N.W.2d 56, 61 (1982), as follows: "Since the adoption of the Rules of Evidence, opinions as to vehicular rates of speed have been elicited in two other cases before us. In *Nickal v. Phinney,* 207 Neb. 281, 298 N.W.2d 360 (1980), a licensed professional engineer with a degree in mechanical engineering and experience in accident reconstruction was permitted to testify as to the speed of plaintiff's motorcycle. His personal knowledge of underlying data included measurements, skid marks, degree of rotation of defendant's pickup, weight of vehicles, road surface conditions, coefficient of friction between the tires and the pavement, change of grade, and other facts. In *Belitz v. Suhr,* 208 Neb. 280, 303 N.W.2d 284 (1981), we held it was error to allow an investigating officer that arrived on the scene an hour after an accident to testify as a lay witness that plaintiff's speed exceeded what was safe for road conditions. The rule to be gleaned from these two cases is that an opinion of vehicular speed is proper, provided a sufficient foundation is laid to show the expertise of the witness, as well as specific knowledge of the underlying facts to deal with the question in issue.

"No exact standard is possible for fixing the qualifications of an expert or skilled witness, and the ruling of a trial judge receiving or excluding an opinion will be reversed on appeal only when a clear abuse of discretion is shown. *Northern Nat. Gas Co.*

v. Beech Aircraft Corp., 202 Neb. 300, 275 N.W.2d 77 (1979); *Danielsen v. Richards Mfg. Co., Inc.*, 206 Neb. 676, 294 N.W.2d 858 (1980); *State v. Loveless*, 209 Neb. 583, 308 N.W.2d 842 (1981)."

There was no abuse of discretion in the admission of the expert testimony. A sufficient foundation was laid showing both his qualifications and knowledge. The hypothetical question posed met the criteria set out in *Hawkins Constr. Co., supra.*

The defendant submitted a requested instruction based upon an interpretation of *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980), which was the same as that requested in *State v. Brittain*, 212 Neb. 686, 325 N.W.2d 141 (1982).

In the *Brittain* case we said at 693-94, 325 N.W.2d at 146: "Finally, the defendant objects to the court having given its own instruction No. 11, and refusing to give the defendant's requested instruction No. 1. These instructions relate to the requirements of *Gerber, supra* . . . . [T]he defendant's proposed instruction stated that if the jury found from the evidence that 'the State has failed to prove any one of these four facts you must totally disregard any testimony or evidence received regarding the blood test itself and the results of the blood test.'

"In refusing the defendant's offered instruction, the court relied upon *State v. Fox*, 177 Neb. 238, 249, 128 N.W.2d 576, 582 (1964), in which we said: 'It is obvious from the record that all the statutory foundational requirements for the admission of the result of the blood analysis have been met, and such evidence was competent and properly admitted. There is nothing in the statutes which, either expressly or inferentially, prohibits the use of an anticoagulant for the purpose of preserving the blood during the interim from withdrawal until the test. Any evidence to the effect that the alcoholic content of the defendant's blood might have been affected by the presence of an improper amount of anticoagulant in the test tube, or by the use of an antiseptic to cleanse

the arm before injection with the syringe and needle, would have no effect upon the admissibility of the test, but, rather, such evidence would go only to the weight and credibility of the test.'

"The defendant insists that *Fox, supra,* is no longer the law in Nebraska, having been overruled by the language of *Gerber, supra,* as set forth earlier in this opinion.

"We do not interpret *Gerber* in this fashion. Both cases deal with the reception of evidence, not proof of facts. Both cases impose certain foundational requirements before the test may be admitted. These requirements were satisfied in the case at bar. Neither case required that the jury reexamine the trial court's ruling on the admissibility of the tests. The defendant was not entitled to the proposed instruction and there was no error in refusing to give it."

The *Gerber* case requires compliance with *methods* of the state Department of Health. In rule 3, "method" is defined and distinguished from "technique" as follows: "(b) Methods and techniques approved by the Department of Health are defined as:

"i. *METHOD* means the name of the principle of analysis. The method may be a *LABORATORY METHOD,* which in these rules and regulations means a method of chemical analysis not using a specifically designed alcohol testing device.

"ii. *TECHNIQUE* means a set of written instructions which describe the procedure, equipment, and equipment preventive maintenance necessary to obtain an accurate alcohol content test result."

The requirements for the container in which the blood is drawn is a "technique" rather than a "method." Failure to comply with a technique is not a failure to prove a foundational element, but affects weight and credibility only. See, also, *State v. Scott,* 206 Neb. 451, 293 N.W.2d 114 (1980); *State v. Kolar,* 206 Neb. 619, 294 N.W.2d 350 (1980).

There being no error, the judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I take the opportunity to file a dissent in this case for the limited reason that I was not a member of the court when we decided the case of *State v. Wahrman,* 199 Neb. 337, 258 N.W.2d 818 (1977). Had I been a member of the court at that time, I would have joined in the dissent of Judges White and McCown. I specifically write now to express my view that I disagree with the rule of law first declared by us in *Zadina v. Weedlun,* 187 Neb. 361, 190 N.W.2d 857 (1971), and repeated again in *State v. Wahrman, supra,* to the effect that when an officer requests an individual to give either a blood or urine sample, pursuant to the provisions of Neb. Rev. Stat. § 39-669.09 (Reissue 1978), the individual need not be advised that the statute entitles the individual to have a physician of his choice present to evaluate his condition and perform or have performed whatever further laboratory tests he deems appropriate in addition to that requested by the officer. It is no longer generally acceptable in American jurisprudence to merely suggest that all persons are presumed to know the law and, therefore, nothing more is ever required. The underlying philosophy which motivated the U.S. Supreme Court to establish the *Miranda* warnings makes that clear. See *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). It does not appear to me to impose an unreasonable burden upon a police officer, who must in the first instance request the test, to further advise an individual that he has a right to select a physician of his choice to perform whatever laboratory tests the physician deems appropriate, particularly in view of the fact that, absent the accused's physician, the tests are conducted completely out of the view of the accused and the results establish the violation, with nothing more. Unless

the individual has been advised of his rights, I have difficulty in seeing how he can knowingly waive them. We have, in a host of cases, now made it clear that before an individual may waive a constitutional right, he must understand that he had that right in the first place and that he knowingly waived the right. See *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). I would opt for a rule which requires the officer to advise the individual of his rights under the provisions of § 39-669.09.

WHITE, J., joins in this dissent.

LANGEL CHEVROLET-CADILLAC, INC., APPELLANT, V. MIDWEST BRIDGE & CONSTRUCTION COMPANY, APPELLEE.

329 N.W.2d 97

Filed January 7, 1983. No. 81-724.

1. **Construction Contracts: Damages.** In general, where a construction contractor follows plans and specifications supplied by the owner which later prove to be defective or insufficient, he is not responsible to the owner for loss or damage resulting therefrom as a consequence of the defectiveness or insufficiency of such plans and specifications.
2. **Prejudgment Interest.** Prejudgment interest is allowable only where the amount of the claim is liquidated; conversely, where reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such a recovery, the claim is considered to be unliquidated and prejudgment interest is not allowed.
3. **Costs.** Where each party obtains judgment against the other, each party should pay the costs of the other.

Appeal from the District Court for Madison County: MERRITT C. WARREN, Judge. Affirmed as modified.

Tim Engler and Murray Ogborn of Nelson & Harding, for appellant.

David A. Domina of the Domina Law Firm, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

CAPORALE, J.

In this appeal the plaintiff-appellant, Langel Chevrolet-Cadillac, Inc. (Langel), seeks recovery of further damages for an alleged breach of a contract by the terms of which defendant-appellee, Midwest Bridge & Construction Company (Midwest), was to construct a concrete parking lot at the location of an automobile dealership owned by Langel. The suit, in substance, alleges breach of express and implied warranties in the failure to properly design and construct the parking lot in a workmanlike manner, with resulting inadequate and improper drainage. We affirm as modified.

After trial, the jury returned a verdict for Langel in the amount of $10,000, on which the District Court entered judgment. The District Court also entered judgment upon a directed verdict, without prejudice to any cause which Langel might have to recover damages from Midwest, in the amount of $8,000, which amount was the balance still due and owing on the contract. The trial court also awarded Midwest prejudgment interest on its $8,000 judgment and ordered each party to pay its own costs.

Langel urges that the trial court erred in refusing to instruct the jury to the effect that the implied warranty of fitness for a particular purpose would necessarily include the legal duty to design the parking lot at issue in a manner which would allow for "proper drainage"; further, that the court below erred when it gave an instruction regarding the liability of a contractor when such contractor has agreed to perform a given undertaking in accordance with prescribed plans; and, finally, that the court erred in directing a verdict for Midwest in the amount of the $8,000 sought in its cross-petition, in granting prejudgment interest thereon, and in ordering each party to pay its own costs.

Langel sought to construct and operate a facility from which to sell and repair automobiles at Norfolk, Nebraska. The process included the construction of a building on the site, followed by the construction of a parking lot, together with related work. Midwest was engaged on three separate occasions to do work. The first involved clearing the site for construction of the building and lot, this phase primarily consisting of removing vegetation; subsequently, Midwest was hired to bring in fill for the building area of the site; and finally, Midwest was hired to construct the parking lot.

The agreement for the construction of the parking lot would appear to be primarily oral in nature, although it was also memorialized in a brief written memorandum (which in reality was little more than a price list) dated September 19, 1978. Evidence was adduced, much of it in conflict, concerning the various communications between the parties as to the construction and design of the parking lot. The conflicts in the evidence are such that a jury could properly find the parking lot was in fact designed by Langel.

The trial court properly instructed the jury that Langel claimed Midwest was hired to design and construct the parking lot; that Midwest constructed the lot in a defective manner, such that the lot failed to drain properly; and that Midwest thus breached both express and implied warranties of workmanship and fitness for the intended purpose. The trial court also properly instructed the jury that Midwest denied Langel's claims and alleged it properly constructed the lot. After setting forth Langel's burdens of proof under its various theories of recovery, the trial court correctly instructed the jury as to the elements of express and implied construction warranties and as to what constitutes the circumstances under which certain warranties are implied. It then instructed as follows:

"Where a contractor makes an absolute and un-

qualified contract to perform a given undertaking, it is the general rule that he assumes the risks attending the performance of the contract. But where he makes a contract to perform a given undertaking in accordance with prescribed plans and specifications, this rule does not apply. Under such a contract he is not permitted to vary from prescribed plans and specifications even if he deems them improper and insufficient; and therefore cannot be held to guarantee that work performed as required by them will be free from defects, or withstand the action of the elements, or accomplish the purpose intended.

"Where the contract specifies what he is to do and the manner and method of doing it, and he does the work specified in the manner specified, his engagement is fulfilled, and he remains liable only for defects resulting from improper workmanship or other fault on his part."

We first address Langel's contention that the trial court erred by its refusal to instruct the jury that Midwest's implied warranty of fitness for a particular purpose included an implied duty to design the parking lot in a fashion which would allow for proper drainage. The refusal did not constitute error, as Langel's request does not state the law in this jurisdiction under the evidence in this case. The authority from other states which Langel cites is unconvincing. Such consists of three North Dakota cases and one Minnesota case, all of which have differing factual bases for the results reached by the respective courts. In *Carlson Homes, Inc. v. Messmer,* 307 N.W.2d 564 (N.D. 1981), the factual recitation in the opinion indicates that the basis of the construction contract was a set of written plans of some detail in nature which were *not* later modified orally. In *Air Heaters, Inc. v. Johnson Elec., Inc.,* 258 N.W.2d 649 (N.D. 1977), the "design" was an express term of the contract, that is, the "design" was a specifically bargained-for element of

detriment for which consideration was given. In *Dobler v. Malloy,* 214 N.W.2d 510 (N.D. 1973), the court sets forth a four-part test required in order for liability to attach in a situation such as this. One of the four parts was that the owner have furnished no plans, designs, specifications, details, or blueprints. The record indicates that this was not the case here. Rather, the owner, on a number of occasions, gave direct and specific instructions as to the ultimate design and lay of the parking lot, even after construction had begun. Finally, in *Robertson Lumber Co. v. Stephen Farmers Co-op. Elev. Co.,* 274 Minn. 17, 143 N.W.2d 622 (1966), the court found specifically that the buyer had only specified the type of construction to be used, relying on the builder for the design thereof and all other details of construction. Therefore, that opinion is not relevant. Also, the court utilized the same four-part test set out in *Dobler, supra;* that test is not met in this matter for the reasons just enumerated. Since the instruction requested and now assigned as error does not express the law in this state and does not even in truth and fact express the law for this set of facts in the jurisdictions cited, it follows that the trial court's refusal to instruct in such a fashion was not error.

Langel's second assignment of error alleges an erroneous instruction as regards the liability of the contractor where the contractor agrees to perform a given undertaking in accordance with prescribed plans and specifications. We note, and Langel concedes, that the general rule is that where a construction contractor follows plans and specifications supplied by the owner which later prove to be defective or insufficient, he is not responsible to the owner for loss or damage resulting therefrom as a consequence of the defectiveness or insufficiency of such plans and specifications. See, e.g., *Farmers Mut. Home Ins. Co. v. Roberts & Dybdahl, Inc.,* 206 Neb. 651, 294 N.W.2d 369 (1980); *Fuchs v. Parsons Constr. Co.,* 172 Neb. 719, 111 N.W.2d 727 (1961).

However, Langel would contend that *State v. Commercial Casualty Ins. Co.,* 125 Neb. 43, 248 N.W. 807 (1933), would shift liability in this case. This is not so. Not only does *Commercial* not speak in terms of the contractor having made an express warranty as to the sufficiency of the builder's plans, as Langel claims it does, but the factual situation therein is completely different from that which we have here. In *Commercial* the State had had its own engineers prepare *all* the terms, plans, and specifications for the project. The contractor was limited to constructing the project as set forth therein. That case is therefore not apposite here.

Further, Langel argues that when it "orally" ordered changes in the plans and specifications, such as they were, for the project, Midwest necessarily warranted expressly to Langel that drainage on the modified lot would still be adequate and proper. A reading of the testimony of Midwest's employee Broders indicates that, while the matter was peripherally discussed, nothing was said or done that would rise to the level of an express warranty regarding drainage. Rather, this point is governed by *Fuchs, supra,* wherein we stated the law to be as contained in the trial court's instruction quoted above. This rule was cited later with approval in *Farmers Mut. Home Ins. Co., supra.*

The instruction given by the court correctly stated the law, and while the proffered paragraph concerning the shift of liability when a contractor has expressly warranted that an owner's plans and specifications are sufficient for the purposes intended may be technically correct, the evidence in the record before us indicates that its exclusion was correct. While there were conversations between Langel and Midwest's employee Broders in regard to various oral modifications of the plan, none of these conversations come close to rising to the level of an express warranty as to the sufficiency of the changes directed by Langel. Therefore, an instruction as to

such a shift of liability would have been improper.

Langel's third assignment of error concerns the directed verdict, without prejudice to its right to recover damages, entered in favor of Midwest on its cross-petition in the amount of $8,000, essentially the amount yet unpaid on the contract price. It is the rule in this jurisdiction that a contractor who has substantially performed his contract is entitled to the contract price less any damages proved to have been occasioned by the less than full performance. *Rickertsen v. Carskadon,* 172 Neb. 46, 108 N.W.2d 392 (1961). See, also, *Nebraska Plumbing Supply Co. v. Payne,* 84 Neb. 390, 121 N.W. 243 (1909). The parties stipulated that the contract entered into was substantially completed. Therefore, the trial court was justified in directing a verdict in favor of Midwest, without prejudice to Langel's ability to prove such damages, if any, as might have been occasioned by any breach by Midwest.

Next to be considered is Langel's claim that the trial court erred in awarding Midwest prejudgment interest on its cross-petition in the amount of $8,000. We agree with Langel. It is the rule in this jurisdiction that prejudgment interest is allowable only where the amount of the claim is liquidated; conversely, where reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such a recovery, the claim is considered to be unliquidated and prejudgment interest is not allowed. *Philip G. Johnson & Co. v. Salmen,* 211 Neb. 123, 317 N.W.2d 900 (1982). See, also, *Omaha Paper Stock Co. v. Harbor Ins. Co.,* 596 F.2d 283 (8th Cir. 1979); *Frank McGill, Inc. v. Nucor Corp.,* 195 Neb. 448, 238 N.W.2d 894 (1976). In this case the amount of Midwest's claim was reasonably disputed and therefore necessarily unliquidated. Notwithstanding the pretrial stipulation of the parties that the contract had been substantially performed, the amount was subject to an offset by the damages claimed, and ultimately proved, by Langel. Therefore, Midwest was

not entitled to the prejudgment interest ordered by the court below.

The final point urged as error by Langel is the order of the lower court that each party pay its own costs. It is the rule in this jurisdiction that where it is not otherwise provided, costs should be allowed as a matter of right to the plaintiff upon a judgment in his favor in an action for the recovery of money only. Neb. Rev. Stat. § 25-1708 (Reissue 1979). At first blush it would appear that Langel was entitled to recover costs against Midwest. A more mature reflection upon the situation, however, indicates that such is not the case. Midwest was tantamount to a plaintiff on its counterclaim for the unpaid amount of the contract price; the fact that it is procedurally permitted by statute to bring its cause as a counterclaim should not preclude its recovery of costs when it in fact prevails on such counterclaim. See Neb. Rev. Stat. §§ 25-811 et seq. (Reissue 1979).

There is a division of authority as to how to assess costs in a situation of this nature. One approach is to award costs to whomever recovers the largest "net" judgment. That is, in a situation such as the one at bar, Midwest would be deemed the "net" taker, and would recover costs. For example, see *Owen Jones & Sons, Inc. v. C. R. Lewis Company,* 497 P.2d 312 (Alaska 1972). Another theory is that each party pays the costs of the other where a defendant prevails on his counterclaim after having been sued by a plaintiff. See *Spicuglia v. Green*, 302 So. 2d 772 (Fla. App. 1974). Finally, a third approach is for the court to simply address the "totality of the litigation," and to decree costs accordingly. See *Nataros v. Fine Arts Gallery of Scottsdale,* 126 Ariz. 44, 612 P.2d 500 (1980). We believe the just and well-reasoned rule, however, to be that in a situation such as the case at bar each party should pay the costs of the other. This would seem to be consistent with § 25-1708 and with certain Nebraska cases, *infra*, decided prior to the implemen-

tation of our modern rules of procedure. It is unlikely that in streamlining litigation there was any intent to routinely preclude a defendant who asserts his counterclaim, after having first been brought into litigation by a plaintiff, from recovering his costs in the event that he prevails on his counterclaim and is thereby effectively a plaintiff thereon within the meaning of § 25-1708. Older Nebraska cases which would seem to support this approach, although they of course do not address it as such, include *Ricenbaw v. Kraus,* 157 Neb. 723, 61 N.W.2d 350 (1953); *Stewart v. Spade Township,* 157 Neb. 93, 58 N.W.2d 841 (1953); and *Miller v. Henderson,* 76 Neb. 383, 107 N.W. 586 (1906).

Not inconsistent with this analysis is *Shellenbarger v. Shellenbarger,* 137 Neb. 762, 291 N.W. 95 (1940), cited by Langel. That case merely reiterated the statutory rule that § 25-1708 applies to actions for recovery of money only and that Neb. Rev. Stat. § 25-1711 (Reissue 1979) does not apply to such actions, but rather only to "other" actions. In view of this analysis, the correct order of the trial court would have been not for each party to pay its own costs but, rather, that each party pay the costs of the other.

In view of the foregoing analysis, the actions of the court below are affirmed as modified.

AFFIRMED AS MODIFIED.

VAL-U CONSTRUCTION COMPANY OF SOUTH DAKOTA, INC., A CORPORATION, APPELLEE, V. CONTRACTORS, INC., A CORPORATION, APPELLANT.

328 N.W.2d 774

Filed January 7, 1983. No. 81-753.

1. **Corporations: Presumptions.** Generally, there is a presumption that the acts of corporate officers pertaining to ordinary business transactions are authorized by the corporation. This presumption

does not apply when an officer diverts or pledges corporate property as security for a personal debt.

2. _____: _____. When a corporate officer acts outside the scope of ordinary business, no presumption of authority arises and the other party to the transaction must make an inquiry into the officer's authority.
3. **Uniform Commercial Code: Security Interests.** One without authority to encumber the property of another can not grant a valid security interest in such property.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Paul R. Elofson of Abrahams, Kaslow & Cassman, for appellant.

Douglas E. Quinn of Thompson, Crounse and Pieper, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

BOSLAUGH, J.

This case arises out of a security agreement in which Fred Valandra, the president of Val-U Construction Company of South Dakota, Inc., a corporation, pledged a 1979 Chevrolet van, the property of the corporation, as security for a personal loan to him from Contractors, Inc.

On June 29, 1981, the plaintiff, Val-U Construction Company, commenced this action in replevin to recover title to and possession of the van from the defendant, Contractors, Inc. The trial court found that the loan from the defendant was made to Valandra in his personal capacity and that the defendant had no valid security interest in the van. The defendant was ordered to deliver title and possession of the van to the plaintiff. The defendant has appealed.

The evidence shows that on September 17, 1980, pursuant to a loan agreement between Valandra and the defendant, Valandra executed a promissory note in the amount of $5,000 in favor of the defendant and signed a security agreement granting the defendant a security interest in the 1979 Chevrolet van.

Valandra also signed a "disclosure statement of loan" listing himself as debtor, although the security agreement listed the plaintiff as the debtor. The check, note, and disclosure statement were not signed by Valandra in his corporate capacity. The defendant issued its check for $5,000 payable to Valandra. The certificate of title to the van, issued to the plaintiff, was delivered to the defendant.

On March 10, 1981, a check for $5,250 drawn on the plaintiff's account by Valandra, and payable to the defendant, was delivered to the defendant. A notation on the check indicated it was for loan repayment. The check was returned by the payor bank marked "Endorsement missing." On March 17, 1981, payment was stopped on all items presented for payment on the plaintiff's account. The bank stopped payment on the check and the defendant received no payment on the loan.

The defendant repossessed the van following the stop payment order and it was sold at a private sale to a third party. The buyer was unable to pay the purchase price and returned the title to the defendant.

There was no evidence as to whether the acts of Valandra were in excess of his corporate authority or were subsequently ratified by the corporation.

The evidence supports the finding that the loan to Valandra was made in his personal capacity. The check from the defendant was payable to him personally. The note listed his home address rather than his business address, and the note and disclosure statement were signed by Valandra in his personal capacity. The finding that the loan was made to Valandra personally was not against the weight of the evidence and was not clearly wrong.

Generally, there is a presumption that the acts of corporate officers pertaining to ordinary business transactions are authorized by the corporation. *Geyer v. The Walling Co.*, 175 Neb. 456, 122 N.W.2d 230 (1963); *Koepplin v. Pfister Hybrid Co.*, 179 Neb.

423, 138 N.W.2d 637 (1965). However, this presumption does not apply when an officer diverts or pledges corporate property as security for a personal debt.

In *Burke v. Munger,* 138 Neb. 74, 292 N.W. 53 (1940), it was held that officers may not pay their personal debts by transfer or encumbrance of corporate property. This same conclusion had been reached in an earlier case, *Bordy v. Goodman-Buckley Trust Co.,* 131 Neb. 342, 268 N.W. 286 (1936). This rule is also stated at 19 C.J.S. *Corporations* § 773 (1940).

When a corporate officer acts outside the scope of ordinary business, no presumption of authority arises and the other party to the transaction must make an inquiry into the officer's authority. In *Electronic Development Co. v. Robson,* 148 Neb. 526, 535, 28 N.W.2d 130, 136-37 (1947), this court said: " 'It is true that a corporation can act only by its agents, and the presumption is that an act pertaining to its ordinary business, when performed by its president, secretary or general manager, is legally done and is binding upon the corporation, yet no such presumption prevails, when the act done by such officers does not fall within the scope of the powers conferred upon and usually exercised by them as part of the ordinary business of the corporation.' "

In *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.,* 156 Neb. 65, 54 N.W.2d 392 (1952), a corporate vice president who was authorized by resolution to borrow "in the name of the Corporation" but only "on behalf of the Corporation" borrowed money in the corporate name and deposited the proceeds in his personal account. We held that the lender bank had a duty of inquiry and investigation to ascertain its own authority and that of the officer. The general rule is that express authority to borrow does not permit an agent to take the proceeds for his own use and behalf. Such action constitutes a sufficient warning of lack of authority.

In *Bank of Benson v. Gordon,* 103 Neb. 508, 511, 172 N.W. 367, 368 (1919), this court stated: "It is within the apparent scope of the authority of a president and general manager of a trading corporation to indorse a negotiable instrument that is payable to the order of the corporation, only in furtherance of the business of such corporation. Where such instrument is indorsed by a corporate officer in the corporate name and given as collateral security for a loan to himself individually, . . . this it seems is sufficient to put the lender on inquiry as to the actual authority of the corporate officer to make such transfer."

There was no presumption that Valandra was authorized to grant a security interest in corporate property as collateral for a personal loan. The fact that Valandra sought to grant a security interest in corporate property for a loan in which the proceeds were payable to himself imposed a duty on the defendant to ascertain Valandra's authority.

One without authority to encumber the property of another can not grant a valid security interest in such property. To create a valid security interest, by a security agreement, Neb. U.C.C. § 9-203 (Reissue 1980) requires that the debtor sign the security agreement, that value be given, and that the debtor have rights in the collateral. Although the code permits a security interest to be taken in property owned by a third party, the authority to encumber the property must be established under other rules of law. See Comment to Neb. U.C.C. § 9-112 (Reissue 1980). Generally, an authorization to encumber the property of another is required before the requisite "rights in the collateral" arise in the obligor-debtor.

In *Gen. Motors Accept. Corp. v. Wash. Tr. Co.,* ____ R.I. ____, ____, 386 A.2d 1096, 1098-99 (1978), the Rhode Island Supreme Court stated: "The phrase 'rights in the collateral' as used in § 6A-9-204(1) has no clear definition. However, the code recognizes

that a debtor who does not own the collateral may nonetheless use the collateral for security, thereby acquiring 'rights in the collateral,' when *authorized* to do so by the actual owner of the collateral." (Emphasis supplied.)

In *Clearfield State Bank v. Contos,* 562 P.2d 622, 624 (Utah 1977), the Utah Supreme Court in interpreting § 9-112 held: "It will be noted that that section does not apply to a situation . . . where the debtor . . . pledges someone else's . . . property *without authority* to do so. It applies to situations where the owner of property, though not the debtor, *is willing* that his property be pledged to secure the indebtedness of another; and it provides for the protection of his property rights." (Emphasis supplied.) See, also, *Towe Farms, Inc. v. Cent. Iowa Prod. Credit,* 528 F. Supp. 500 (S.D. Iowa 1981). The finding of the District Court that the defendant had no valid security interest in the van is supported by the record.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. DEAN HOHNSTEIN, APPELLANT.

328 N.W.2d 777

Filed January 7, 1983. No. 82-225.

1. **Arson: Proof.** Under Neb. Rev. Stat. § 28-502 (Reissue 1979), arson in the first degree does not require proof that some part of the building was ignited. It is sufficient if the evidence shows there was some damage to the building.
2. _____: _____. The fact that a building was constructed of nonflammable materials does not prevent proof of first degree arson under Neb. Rev. Stat. § 28-502 (Reissue 1979), since it is only necessary to show that some damage to the building resulted from the fire.
3. **Criminal Attempt: Proof.** Proof of the actual commission of an offense is sufficient to sustain a conviction for attempt.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

George A. Sommer, for appellant.

Paul L. Douglas, Attorney General, and Frank J. Hutfless, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

BOSLAUGH, J.

The defendant was convicted of attempted arson in the first degree and sentenced to imprisonment for 3 to 5 years. He has appealed and assigns as error the sufficiency of the evidence to sustain the conviction, the giving of an instruction on attempted arson, and that the sentence was excessive.

On June 17, 1981, the defendant was a prisoner in the Scotts Bluff County jail, serving terms of imprisonment for the sale of marijuana and forgery. On that date the prisoners in the area in which the defendant was housed became discontented with various aspects of the way the jail was being operated. The defendant suggested the inmates flood the area by stopping up the toilets. This was done until water covered much of the floor. The inmates then began throwing lighted matches at a magazine, which caught on fire. The defendant threw matches at the magazine, and also threw a book and a pair of men's undershorts on the resulting fire in the walkway between the cells. After a jailer extinguished the first fire, some of the prisoners started a second fire. The defendant did not participate in the second fire.

As a result of the fires, the area was smoke-filled, and the paint on one of the bars was scorched. The damage to the structure of the jail was slight. The jail supervisor testified that he believed the smoke presented a risk of carbon monoxide poisoning.

The information charged the defendant with first degree arson by "intentionally damag[ing] a build-

ing by starting a fire or causing an explosion, when another person was present in the building at the time and he knew that fact." The defendant relies upon the common-law concept of arson and argues that proof was required that some part of the building was ignited. He also argues that an intent to burn can not be demonstrated when the building is nonflammable.

Neb. Rev. Stat. § 28-502 (Reissue 1979) provides: "(1) A person commits arson in the first degree if he intentionally damages a building by starting a fire or causing an explosion, when another person is present in the building at the time and either (a) the actor knows that fact, or (b) the circumstances are such as to render the presence of a person therein a reasonable probability.

"(2) Arson in the first degree is a Class II felony."

The defendant's argument finds no support in the statute. Section 28-502 requires only damage to a building as a result of a fire ignited when another person is present in the building. It is clear from the evidence that the fire damaged the building and the defendant intended such a result.

Similar conclusions have been reached by other courts in interpreting comparable statutes. In *Romo v. State,* 593 S.W.2d 690 (Tex. Crim. App. 1980), prisoners were involved in setting a fire in a jail in much the same manner as in the present case. In assailing his conviction for arson, the defendant argued that intent to commit arson could not be found when the building was nonflammable. In rejecting this contention, the court said: "Appellant places great emphasis on the fact that the building was constructed of nonflammable materials. He argues that intent to damage or destroy cannot be inferred unless the building is made of flammable materials. Appellant overlooks the fact that the statute reads '*damage* or destroy' [Emphasis added]. Material need not be combustible to be

damaged by fire. A fire may produce scorching and smoke damage without igniting the surrounding materials. Furthermore, the Legislature removed the requirement under prior law that the building be ignited in fact." *Id.* at 693.

In *Smith v. State,* 140 Ga. App. 200, 230 S.E.2d 350 (1976), a defendant appealed his conviction for first degree arson. He raised an argument similar to that raised in the case at bar. In affirming the conviction the court stated: "It was shown at the trial that the only damage to the building was heavy smoke damage which required special machinery to remove it from the building. The jail itself was not charred or burned. Code § 26-1401 provides in part that 'A person commits arson in the first degree when, by means of fire or explosive, he knowingly damages: . . .' The phrase 'knowingly damages' is not further defined by the statute. It is defendant's contention that this requires proof of charring or burning of the building itself. We do not agree. The verb 'damages' is an ordinary word and when it is used in a statute it must be given its ordinary signification. Code § 102-102(1). Webster defines 'damage' as 'To hurt; impair.' Thus, causing smoke damage to the jail building falls within this definition and constitutes arson in the first degree if the other elements of the crime are present."

The defendant relies on *Harms v. State,* 147 Neb. 857, 25 N.W.2d 287 (1946), and *State v. Keeton,* 199 Neb. 405, 259 N.W.2d 277 (1977). At the time the *Harms* case was decided, a statute was in force, Neb. Rev. Stat. § 28-504.01 (1943), which required the ignition of a building as an element of first degree arson. The statute involved in *State v. Keeton, supra,* contained a similar requirement. See Neb. Rev. Stat. § 28-504.01 (Reissue 1975). These cases are not controlling here.

The evidence in this case on each element of the crime was sufficient for the jury to find the defendant guilty beyond a reasonable doubt. As stated in

Matter of Appeal in Pima Cty. Juv. Act No. J-37390-1, 116 Ariz. 519, 522, 570 P.2d 206, 209 (1977): "An intent or animus against the property itself or its owner is not an element of common law arson." The State also proved beyond a reasonable doubt that damage resulted to the building, that others were present in the building, and that defendant acted to start a fire.

In this case defendant was convicted of attempted arson. The statute dealing with criminal attempt provides: "(1) A person shall be guilty of an attempt to commit a crime if he:

"(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

"(b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.

"(2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

"(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent." Neb. Rev. Stat. § 28-201 (Reissue 1979).

The evidence established that the defendant took more than a substantial step toward the completion of the attempted crime. This was sufficient evidence to sustain the verdict. See *State v. Sodders,* 208 Neb. 504, 304 N.W.2d 62 (1981). See, also, *State v. Gallegos,* 193 Neb. 651, 654, 228 N.W.2d 615, 617 (1975), wherein this court stated that "In every case where an attempt is charged, proof of the actual

commission of the offense establishes the attempt."

The defendant argues that the instructions were erroneous because they failed to inform the jury that arson and attempted arson require a burning of the building. As stated above, this is not the law in Nebraska at this time. The jury was properly instructed as to the elements of arson and attempted arson.

Defendant's final assignment of error is that the sentence is excessive. A sentence within the statutory limits will not be disturbed on appeal in the absence of evidence showing an abuse of discretion by the trial court. *State v. McNichols,* 210 Neb. 875, 317 N.W.2d 95 (1982). Attempted arson in the first degree is a Class III felony, the maximum penalty for which is 20 years' imprisonment, $25,000 fine, or both. See Neb. Rev. Stat. §§ 28-105, 28-201, 28-502 (Reissue 1979).

The defendant is 20 years of age. His juvenile record commenced in 1976. He was serving separate 6-month sentences for forgery and delivery of a controlled substance at the time of the commission of this crime.

Although the damage to the building was slight, any fire in a confined area, particularly a prison, poses a serious risk to the safety of others. The sentence was not excessive. The judgment is affirmed.

AFFIRMED.

MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY, APPELLANT, V. RICHARD CHISHOLM, APPELLEE.

329 N.W.2d 103

Filed January 14, 1983. No. 44521.

1. **Insurance: Estoppel.** An insurer that gives one reason for its con-

duct and decision as to a matter involved in controversy cannot, after litigation has begun, depend upon another and different ground.

2. **Summary Judgment.** Under Nebraska law the primary purpose of the summary judgment statute, Neb. Rev. Stat. § 25-1332 (Reissue 1979), is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense.
3. _____. Summary judgment should be rendered forthwith if the pleadings, depositions, and admissions are on file, together with the affidavit, if any, showing that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.
4. **Insurance.** The issuance of a life policy is dependent upon the health of the applicant, and a willful and intentional failure of an application to disclose, in response to direct and clear inquiry, that which the company had the right to know for the purpose of determining the true state of health of the applicant, and whether or not it would accept the risk, cannot be considered other than fraudulent.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Raymond M. Crossman, Jr., of Crossman & Norris, for appellant.

Everett Inbody of Haessler, Sullivan & Inbody, and John Haessler, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

This is an action by plaintiff-appellant, Mutual Benefit Life Insurance Company of New Jersey (Mutual Benefit), for rescission of a group life insurance contract on the life of Freddie R. Long (insured) on the ground of fraudulent misrepresentation by the insured in his application for insurance. Defendant-appellee, Richard Chisholm (Chisholm), generally denied the allegations and cross-petitioned to recover the proceeds as beneficiary of the life insurance policy. Chisholm then filed a motion to strike portions of Mutual Benefit's petition and also filed a motion for summary judgment. The trial

court sustained both motions and entered judgment for the defendant on the cross-petition. This appeal followed, with Mutual Benefit making the following assignments of error: (1) The trial court erred in sustaining Chisholm's motion to strike paragraph 6 of Mutual Benefit's second amended petition; and (2) The trial court erred in entering a summary judgment dismissing Mutual Benefit's second amended petition and awarding Chisholm $102,000 plus interest and attorney fees. We affirm.

Chisholm is the beneficiary of a group life insurance policy issued on March 6, 1978, by Mutual Benefit on the life of Freddie R. Long. The insured was 27 years old at the time the policy was issued and was eligible for group coverage by virtue of his active status in the Nebraska National Guard.

In the application for group life insurance question 13 asked if the applicant "ever had heart trouble, chest pain, high blood pressure, cancer, diabetes, kidney trouble, stomach trouble, a nervous or mental disorder *or other chronic trouble?*" (Emphasis supplied.) The insured answered "No."

Question 15 asked if the applicant "in the past five years, had any surgery, treatment, observation or routine examination in doctor's office, hospital, clinic, or sanitarium?" The question further provided instructions which stated: "For routine physical examinations indicating *only* good health for you . . . state 'routine exams' beside your 'yes' answer." The applicant checked a box beside the word yes, and stated "Routine Exams."

The insured died in an automobile accident on July 30, 1978. The beneficiary, Chisholm, provided Mutual Benefit with proof of death on August 28, 1978. Mutual Benefit began an investigation and on November 10, 1978, denied Chisholm's claim and attempted to rescind its coverage under the policy. The sole reason advanced for Mutual Benefit's refusal to pay over the proceeds of the policy was the insured's answer to question 15 on the application.

The letter of declination set forth the following: "When Mr. Long signed his application 2/17/78, he indicated only routine exams. Information now on file indicates that Mr. Long received treatment at York General Hospital in November, 1976. Our Medical Underwriting Department advises had we known of this medical history at the time of application we would have not issued group term life coverage in his behalf."

On February 14, 1979, Mutual Benefit filed its original petition in an action to rescind the policy issued to Freddie R. Long on the ground of misrepresentation. The only allegation of misrepresentation contained in the petition was the failure of the insured to disclose the treatment he received at York General Hospital as stated in the declination letter. Mutual Benefit maintained this single theory of misrepresentation throughout discovery, as evidenced by its answers to interrogatories. After minor amendments were made to the petition by Mutual Benefit, Chisholm filed an answer and cross-petition, generally denying the allegations and, in addition, alleging that Mutual Benefit was estopped to raise any defense other than that set forth in its declination letter.

Mutual Benefit filed its second amended petition on September 8, 1980, which contained a new allegation of misrepresentation by the insured. The new paragraph 6 alleged that the insured had falsely answered question 13 because he did not disclose alcoholism "as evidenced by his convictions for 'driving while under the influence of alcohol' " and an "Order of Probation from the District Court of York County, Nebraska."

Chisholm moved to strike paragraph 6 on the grounds that Mutual Benefit was raising a new issue that it was estopped to raise and also that the allegations were based on convictions that would not be admissible in a nonrelated civil matter. The District Court granted the motion to strike. Mutual

Benefit chose not to replead and Chisholm answered and cross-petitioned to the second amended petition as stricken.

Chisholm then filed a motion for summary judgment. The record considered by the trial court consisted of Mutual Benefit's second amended petition as stricken, appellee's answer and cross-petition, certain answers to interrogatories, and portions of depositions. The court found that, based upon the pleadings and evidence submitted on the motion, there was no genuine issue as to any material fact and Chisholm was entitled to judgment as a matter of law. It is from these rulings by the trial court that Mutual Benefit appeals.

Mutual Benefit argues that although it may have changed its allegations of misrepresentation, it has not taken a position contradictory or inconsistent with its original position and, therefore, should not have been estopped from raising the issue of the insured's alleged alcoholism in its second amended petition. Mutual Benefit maintains that its investigation indicated that alcohol may have been a causative factor in the insured's November 1976 accident and also in the July 1978 accident which claimed his life. Therefore, its added allegation concerning the misrepresentation of alcoholism on question 13 of the application constituted the same material misrepresentation as the insured's failing to report the automobile accident on question 15 of the application in which alcohol may have been involved.

We believe that Mutual Benefit is estopped from mending its hold by the raising of any defense other than that upon which it rejected Chisholm's claim in its declination letter of November 10, 1978. Our reason for so holding is that on no occasion prior to the second amended petition did Mutual Benefit ever state that the insured's misrepresentation of alcoholism was a basis for its denial of the claim. Rather, what appears from the record is that Mutual Benefit was relying solely on the failure of the insured to re-

port the treatment he received at York General Hospital as a result of the November 1976 automobile accident. Mutual Benefit stated in its declination letter that had its medical underwriting department "known of this medical history at the time of application we would have not issued group term life coverage in his behalf." It is obvious that Mutual Benefit stood on this theory for denial of the claim until the following testimony of James B. McKelvey, supervisor of Mutual Benefit's medical underwriting department, was obtained in deposition. "Q [by Mr. Crossman] If he had told you, as reflected on Exhibit 7, [the York General Hospital report] that he had had an automobile accident which had caused his hospitalization, what would you have done? . . . Q (By Mr. Crossman) Go ahead and answer. A If he had just indicated 'automobile accident,' we would have probably issued the coverage. Q Would you have asked for the hospital records that were involved in the automobile accident? A It depends, really, how recent it was at the time of the application. Q Well, suppose he had said that, 'On November 23, 1976, I had an automobile accident and I was hospitalized,' and his application was on February 17, 1978. . . . A No, I wouldn't have. Q (By Mr. Crossman) You would not have asked for the hospital record? A No."

It was not until after Mr. McKelvey's deposition was taken that Mutual Benefit proffered the new and different allegation of the insured's misrepresentation of his alleged alcoholism.

Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and a different consideration. *O'Neil v. Union Nat. Life Ins. Co.*, 162 Neb. 284, 75 N.W.2d 739 (1956); *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, 248 N.W. 397 (1933).

An insurer that gives one reason for its conduct

and decision as to a matter involved in controversy cannot, after litigation has begun, defend upon another and different ground. *Serven v. Metropolitan Life Ins. Co.,* 132 Neb. 637, 272 N.W. 922 (1937); *Moore v. Washington National Ins. Co.,* 135 Neb. 29, 280 N.W. 221 (1938).

In the instant case, whether or not Mutual Benefit subjectively intended to rely on the alleged alcoholism of the insured as a defense from the outset of this litigation is irrelevant. There is nothing before this court involving this second allegation of misrepresentation until the second amended petition of Mutual Benefit. Chisholm was not made expressly aware of this second defense in the letter of declination, nor was it even remotely implied as contended by Mutual Benefit. We therefore conclude that the only defense available to Mutual Benefit in this action is that raised in the letter previously referred to.

Mutual Benefit's second assignment of error is that the trial court should not have granted summary judgment and dismissed its action against Chisholm.

Under Nebraska law the primary purpose of the summary judgment statute, Neb. Rev. Stat. § 25-1332 (Reissue 1979), is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense. *Okeson v. Jack Dempsey Drywall, Inc.,* 207 Neb. 847, 301 N.W.2d 356 (1981); *French v. Cornwell,* 202 Neb. 569, 276 N.W.2d 216 (1979).

Summary judgment should be rendered forthwith if the pleadings, depositions, and admissions are on file, together with the affidavit, if any, showing that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Okeson, supra; Negus-Sweenie, Inc. v. Beaver Lake Corp.,* 202 Neb. 671, 276 N.W.2d 668 (1979).

The issuance of policies is dependent upon the health of the applicant, and a willful and intentional failure of an application to disclose, in response to direct and clear inquiry, that which the company had the right to know for the purpose of determining the true state of health of the applicant, and whether or not it would accept the risk, cannot be considered other than fraudulent. *Gillan v. Equitable Life Assurance Society,* 143 Neb. 647, 10 N.W.2d 693 (1943).

All Mutual Benefit requested in question 15 was whether there had been any treatment of the insured by a doctor in the past 5 years and whether the examination was routine. The evidence showed that while there had been an automobile accident, the insured's hospitalization at York General Hospital on November 23, 1976, was for minor injuries for which the prognosis was good. Mutual Benefit's own underwriting department stated that the injuries were of no underwriting concern. We therefore agree with the finding of the trial court that the insured had a routine examination as reflected in his answer to question 15 of the application and that no misrepresentation occurred.

Mutual Benefit has failed to plead and prove the requisite elements of misrepresentation as set forth by this court in *Carpenter v. Sun Indemnity Co.,* 138 Neb. 552, 293 N.W. 400 (1940). If Mutual Benefit wanted additional underwriting information as to the insured's driving record and use of alcohol, it should have asked the pertinent questions.

The decision of the District Court in granting summary judgment was correct and is hereby affirmed. The appellee is entitled to an award of attorney fees in this court under Neb. Rev. Stat. § 44-359 (Reissue 1978). The fee is fixed at $1,500.

AFFIRMED.

WHITE, J., participating on briefs.

CAPORALE, J., concurring.

I agree that Mutual Benefit did not ask the proper questions to elicit information concerning Mr.

Long's drinking habits. That circumstance, together with Mutual Benefit's own testimony that the injuries sustained in the automobile accident were not of underwriting concern, leads me to concur in the result reached in this case.

My misgiving arises from the confusion which appears to surround the restated rule that once an insurer gives a reason for its conduct and decision, it cannot, after litigation has begun, change its ground and put its conduct upon another and different consideration. The cases cited by the majority certainly establish that the rule exists and has been applied in insurance cases. Indeed, the rule has been applied in certain noninsurance cases as, for example, situations in which no objective evidence of some later asserted reason existed. See, *Kucera v. Kavan,* 165 Neb. 131, 84 N.W.2d 207 (1957); *Powers v. Bohuslav,* 84 Neb. 179, 120 N.W. 942 (1909); *Frenzer v. Dufrene,* 58 Neb. 432, 78 N.W. 719 (1899). See, also, *Tate & Ehrhardt v. Loney,* 85 Neb. 559, 123 N.W. 1050 (1909).

I respectfully suggest, however, that such a rule makes no sense in the absence of showing detrimental reliance upon the prior statements or conduct. The rule, after all, is one of estoppel. Estoppel ordinarily requires as one of its elements proof that the party asserting the doctrine has been prejudiced by good faith reliance upon the statements or conduct of the other party. *Lovell v. City of Kearney,* 200 Neb. 478, 263 N.W.2d 867 (1978); *Christian v. Geis,* 193 Neb. 146, 225 N.W.2d 868 (1975); *Willan v. Farrar,* 176 Neb. 1, 124 N.W.2d 699 (1963). I would make clear that, as an element of the rule, good faith detrimental reliance upon an insurer's prior statements or conduct must be shown.

BOSLAUGH and MCCOWN, JJ., join in this concurrence.

RONALD SCHROLL, APPELLANT, V. KEVIN FULTON, A MINOR CHILD, ET AL., APPELLEES.

328 N.W.2d 780

Filed January 14, 1983. No. 81-657.

1. **Jurors.** A party who fails to challenge the jurors for disqualification and passes the jurors for cause waives any objection to their selection.
2. **Motions for New Trial.** A motion for new trial on the ground of surprise is properly overruled where a request for a continuance for that reason was not made at the trial.
3. **Evidence: Appeal and Error.** It is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact.
4. **Verdicts: Appeal and Error.** A jury verdict based upon conflicting evidence will not be set aside unless clearly wrong.

Appeal from the District Court for Sherman County: DEWAYNE WOLF, Judge. Affirmed.

John S. Mingus of Mingus & Mingus, for appellant.

Jacobsen, Orr & Nelson, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

MCCOWN, J.

The plaintiff, Ronald Schroll, brought this civil action against Kevin Fulton, a minor, and his parents for damages resulting from an assault and battery. The jury returned a verdict for the defendants and the plaintiff has appealed.

This action was initially filed by the plaintiff against two minor defendants, Kevin Fulton and David Shotkowski, and their respective parents. The defendants' pleadings later established that Shotkowski and his parents had paid $7,500 to Schroll and his wife and obtained a full release. A motion in limine to prohibit the introduction of any evidence of the payment or release was sustained prior to trial, and the action continued only against the defendant Fulton and his parents. Self-defense

was affirmatively pleaded by Fulton.

The plaintiff was a vocational agriculture teacher at the public high school in Loup City, Nebraska. On May 22, 1978, the defendant Kevin Fulton and David Shotkowski, who had just graduated from the high school, went to the plaintiff's classroom to inquire about the grades they had each received from the plaintiff in a farm management class which both of them had just completed. The two students approached plaintiff's desk and the plaintiff told them to go to the office and get a pass. From this point on the evidence is conflicting and confusing.

Plaintiff testified that defendant Fulton suddenly lunged at the plaintiff, knocking him onto the floor, where he was beaten and kicked by both Fulton and Shotkowski. Fulton testified that plaintiff shoved him and that he shoved back and plaintiff fell back over a chair and onto the floor, where Fulton saw Shotkowski kicking the plaintiff. Fulton testified that he did not strike the plaintiff and that he did not remember kicking him. Shotkowski did not testify.

The plaintiff sustained multiple bruises and contusions, principally to the head and upper body, and was hospitalized for 2 days.

The jury returned a verdict in favor of the defendants. Following the overruling of motions to set aside the verdict and for new trial, the plaintiff has appealed.

Plaintiff first contends that several husbands and wives were on the jury panel, in violation of Neb. Rev. Stat. § 25-1601 (Reissue 1979). There was no evidence, however, that any statutorily disqualified person actually served as a juror at the trial.

Plaintiff's counsel had the original jury panel list by April 23, 1981, a revised list by July 2, and the trial did not commence until July 6, 1981. No objection was made as to the presence of married couples on the panel until after the trial was completed. Neb. Rev. Stat. § 25-1637 (Reissue 1979) requires that the challenge to a jury array must be made in any

event before the jury is sworn to try the case.

A party cannot voluntarily take his chances with a jury and then obtain another trial on the ground that the jury was irregularly called. A party who fails to challenge the jurors for disqualification and passes the jurors for cause waives any objection to their selection. *Regier v. Nebraska P. P. Dist.,* 189 Neb. 56, 199 N.W.2d 742 (1972). No possibility of prejudice has been shown in the present case.

Plaintiff also contends that the trial court erroneously overruled a motion for new trial on the ground of newly discovered evidence. The ground for the motion was that the plaintiff had had a subpoena issued for Lyle Garwood, a teacher at the high school who had been a witness to at least a part of the assault and battery incident. The subpoena was never served and Garwood misunderstood the date of trial and did not appear. Plaintiff's counsel knew what his testimony was to be but failed to see that the subpoena was properly served.

Obviously, Garwood's testimony was not newly discovered evidence which plaintiff's counsel could not, with reasonable diligence, have discovered and produced at trial, within the meaning of Neb. Rev. Stat. § 25-1142 (Reissue 1979). When plaintiff's counsel discovered at trial that Garwood would not be present, he failed to move for a continuance or make any timely application for relief until after the jury verdict, when it was too late.

A motion for new trial on the ground of surprise is properly overruled where a request for a continuance for that reason was not made at the trial. *Kehm v. Dumpert,* 183 Neb. 568, 162 N.W.2d 520 (1968).

Finally, the plaintiff contends the defendant Fulton was guilty of perjury because his version of the facts was in conflict with the expected testimony of Garwood. Garwood's testimony could only serve to discredit or impeach Fulton, but a mere conflict in evidence is not proof of perjury. There is no merit to plaintiff's contention.

A jury verdict based upon conflicting evidence will not be set aside unless it is clearly wrong. It is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. *Merten v. Pedersen,* 199 Neb. 34, 255 N.W.2d 869 (1977).

Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *Schreves v. D. R. Anderson Constructors, Inc.,* 206 Neb. 433, 293 N.W.2d 106 (1980). The evidence in the case now before us is sufficient to support the verdict and there was no prejudicial error.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., not participating.

NEVA RICHARDS, APPELLANT, V. DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLEES.

328 N.W.2d 783

Filed January 14, 1983. No. 81-714.

1. **Mental Health.** Since 1976, only mentally ill dangerous persons are subject to involuntary commitment.
2. **Political Subdivisions Tort Claims Act: Appeal and Error.** The findings of fact made by the District Court in an action under the Political Subdivisions Tort Claims Act will not be disturbed on appeal unless clearly wrong.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Richard J. Schicker of Schicker & Leahy, for appellant.

Donald L. Knowles, Douglas County Attorney, and Thomas E. Brown, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

BOSLAUGH, J.

The plaintiff, Neva Richards, was severely injured when she was stabbed seven times by Theodore LaBute while attending a church service at the Pathway of Light Cathedral in Omaha, Nebraska, on December 21, 1977. The attack was entirely unprovoked. LaBute had a history of mental illness and was a stranger to the plaintiff.

This action was brought against Douglas County, Nebraska, to recover damages for the injuries the plaintiff sustained in the stabbing incident. The plaintiff's theory of the case was that an employee of the county had negligently failed to accept and process an "application" for involuntary commitment of LaBute presented by his mother, Mary Theresa LaBute, on or about December 5, 1977.

The fourth amended petition specifically alleged as follows: "11. The direct and proximate cause of the stabbing of Plaintiff by Theodore LaBute was the negligence of the Defendant in the following particular: The clerk of the Douglas County Board of Mental Health failed and neglected to accept and process the Petition of Involuntary Commitment of Theodore LaBute when the same was prepared and presented by Mary D. LaBute on or about December 6, 1977 when it was evident that Theodore LaBute represented a serious threat of harm to himself or others and came within the provisions of 83-1009 R.R.S."

Neb. Rev. Stat. § 83-1009 (Reissue 1981) defines the term "mentally ill dangerous person" as follows: "Mentally ill dangerous person shall mean any mentally ill person or alcoholic person who presents:

"(1) A substantial risk of serious harm to another person or persons within the near future, as manifested by evidence of recent violent acts or threats

of violence or by placing others in reasonable fear of such harm; or

"(2) A substantial risk of serious harm to himself within the near future, as manifested by evidence of recent attempts at, or threats of, suicide or serious bodily harm, or evidence of inability to provide for his basic human needs, including food, clothing, shelter, essential medical care, or personal safety."

The case was tried upon depositions and other documentary evidence. The trial court found generally for the defendant and dismissed the petition. The order overruling the plaintiff's motion for new trial contained these findings: "The Court finds that plaintiff failed to prove negligence on the part of the defendant by a preponderance of the evidence.

"The Court further finds that assuming the truth of Mary La Bate's [sic] testimony that she went to the offices of the Douglas County Board of Health with the intention of initiating committment [sic] proceedings the evidence is clear that she voluntarily abandoned all efforts to initiate those proceedings by leaving said offices before filing a petition or application for committment [sic]."

The evidence shows that Mrs. LaBute appeared at the office of the board of mental health in Douglas County on or about December 27, 1977, 5 or 6 days after the stabbing incident, and was successful in having her son involuntarily committed. Toby Raznick, an assistant secretary to the board of mental health, with 10 years' experience in that job, assisted Mrs. LaBute with her "application" on that occasion. Mrs. LaBute claims that Mrs. Raznick was the employee she talked to on December 5. Mrs. Raznick testified that she had never seen Mrs. LaBute prior to December 27, 1977. Mrs. Raznick further testified that she had never rejected any "application" or preliminary form for involuntary commitment and had no authority to do so.

Mrs. Raznick testified that the procedure for an involuntary commitment commences with an ex-

planation of the requirements for an involuntary commitment. The person seeking an involuntary commitment of another is given a printed explanation of the requirements for an involuntary commitment. If the person seeking the commitment believes they qualify, he is then asked to fill out an "application," or preliminary form, which requests the essential information concerning the person to be committed, together with the facts concerning overt acts within the last 90 days which he believes show the person to be committed is mentally ill and dangerous to himself or other persons. After the form has been completed, the county attorney's office is notified and the person seeking the commitment is interviewed. The decision as to whether a petition will be filed is made by the office of the county attorney.

Mrs. LaBute testified that she obtained the "application," or preliminary information form, from the county employee and partially completed it, but was unable to list any overt acts which demonstrated that her son was dangerous to others.

Although Mrs. LaBute testified that the employee told her, "I don't think you have a case," she also testified that when the employee gave her the form the employee stated, "Do you understand that he must be dangerous to himself or a danger to others, or you have no case?"

Since 1976, only mentally ill dangerous persons are subject to involuntary commitment. Neb. Rev. Stat. § 83-1037 (Reissue 1981). See, also, *Petersen v. County Board of Mental Health,* 203 Neb. 622, 279 N.W.2d 844 (1979).

It is clear from the evidence that Mrs. LaBute did not believe her son was dangerous. When asked what he had done to hurt someone, Mrs. LaBute said she "didn't know of anything that he had done in that way." When asked specifically if she had any reason to believe Ted was dangerous to others, she said "No."

Mrs. LaBute further testified that to her knowledge Ted had never done anything to indicate he was dangerous to others. She said: "He was very passive and very helpful, friendly, gentle. He was kind to animals and people." She said Ted had never attacked anyone, that she knew of, and had not threatened anybody.

Deo LaBute, the father of Theodore, testified to the same effect. He said he never thought that his son would cause physical harm to or assault anybody or cause physical harm to himself.

With respect to the information form that Mrs. LaBute partially completed, she testified, "I don't know whether I left the paper, I had started to fill it out and I don't know if I left [it] there or threw it away or what happened." Mrs. LaBute admitted that the employee did not tell her not to complete the form. She testified that after the employee gave her the form, she "filled as much as I could, and on the form I noticed that I had to, you know, write the things that he had done that I considered dangerous. And the things he had done that were irrational more than dangerous. So I didn't complete the form. I didn't feel it was of any use." Mrs. LaBute then left the office.

The findings of fact made by the District Court in an action under the Political Subdivisions Tort Claims Act will not be disturbed on appeal unless clearly wrong. *Hume v. Otoe County,* 212 Neb. 616, 324 N.W.2d 810 (1982); *Watson v. City of Omaha,* 209 Neb. 835, 312 N.W.2d 256 (1981); *Miles v. School Dist. No. 138,* 204 Neb. 105, 281 N.W.2d 396 (1979).

The record in this case fully supports the findings made by the trial court. The judgment of the District Court is therefore affirmed.

AFFIRMED.

CLINTON, J., not participating.

ALICE BROWN, APPELLANT, V. OTIS GLEBE, APPELLEE.
328 N.W.2d 786

Filed January 14, 1983. No. 81-735.

1. **Foreclosure: Presumptions.** Sheriff's deeds are specially covered by Neb. Rev. Stat. §§ 77-1901 et seq. (Reissue 1981) and, unlike the provisions for tax certificates, there is no section establishing a presumption regarding service, as is true in the case of a treasurer's deed.
2. **Foreclosure: Liens.** A decree of foreclosure of a tax lien is of no effect as against the persons who were, at the time of the foreclosure, in actual possession and who were not made parties defendant in the action and had no notice or knowledge of the suit.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Reversed and remanded with directions.

Walter M. Calinger of Wall, Wintroub & Weiner, for appellant.

James P. Miller, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, Alice Brown, filed this suit on November 6, 1980, seeking to remove a cloud on the title to certain property allegedly owned by Brown in Omaha, Douglas County, Nebraska. The appellee, Otis Glebe, had acquired title to the Brown property in October of 1971 after securing a sheriff's deed to the property and holding it for 2 years prior to confirmation as provided by the provisions of Neb. Rev. Stat. §§ 77-1903 and 77-1913 (Reissue 1981). Following trial, the trial court quieted title to the property in Glebe under certain conditions. For reasons set out more particularly in this opinion, we believe that, on the basis of the record before us, the decision of the trial court was in error and its judgment must be reversed and the cause remanded.

The record discloses that in 1955 Brown acquired title to certain real estate in Omaha, Douglas

County, Nebraska, described as Lot 5, Block 42, Kountze Place, an Addition to the City of Omaha, Douglas County, Nebraska. Brown acquired title to the property by warranty deed from the previous owners and has been in continuous physical possession of the property since that date.

The record further discloses that Brown failed to pay some, if not all, of the real estate taxes on the property between the date of its purchase in 1955 and 1970. The county attorney thereafter proceeded to foreclose on the property pursuant to the provisions of Neb. Rev. Stat. § 77-1918 (Reissue 1981). Glebe purchased the property at the tax foreclosure sale for $310. As already noted, at the time the tax foreclosure proceedings were brought in 1971, Brown was in actual possession of the property, and according to her testimony was never served with notice of the foreclosure action. For reasons which are not at all clear, Glebe refused to introduce into evidence the sheriff's return filed in the foreclosure action showing service on Brown, if in fact such service was made. Brown continued to live on the property after the sheriff's sale and made monthly rental payments to Glebe, under what she described as "protest." Glebe, having apparently taken a lesson from Brown, likewise failed to pay any taxes on the subject property, and on November 7, 1977, Brown obtained a county treasurer's certificate of tax sale after paying $965.45 in satisfaction of delinquent city and county taxes for the years 1973 through 1977. This was pursuant to the provisions of Neb. Rev. Stat. § 77-1809 (Reissue 1981).

In 1980 Brown filed this suit to quiet title to the property and prayed for equitable relief. One ground for relief was that the sheriff's deed issued to Glebe should be set aside due to the fact that she was not served and therefore his deed was void, or, in the alternative, that title be quieted in her favor by foreclosing her tax certificate pursuant to the provisions of Neb. Rev. Stat. § 77-1831 (Reissue 1981).

Following trial, the District Court held that Glebe was the title owner of the property by virtue of the sheriff's deed dated November 1, 1973. It also found that the tax certificate purchased by Brown was merely a lien upon the property and ordered that the property be sold unless Glebe pay to Brown the amount of the lien within 20 days after entry of the decree. Glebe in fact paid the required sum into the court registry within the 20 days and Brown perfected this appeal.

Since this is an equitable action, difficult as that may be to glean from the facts of this case, it is the duty of this court to try the issues de novo on the record and reach independent conclusions without being influenced by the findings of the trial court. See, *Sturm v. Mau,* 209 Neb. 865, 312 N.W.2d 272 (1981); *Bartlett v. Kloepping,* 195 Neb. 755, 240 N.W.2d 592 (1976). The first issue which must be addressed is whether the record shows that Brown was served in the foreclosure action. The only evidence in this record concerning service on Brown is Brown's own uncontradicted and unimpeached testimony that she never received service of process with regard to the foreclosure. Glebe argues that there is a presumption of validity pursuant to the provisions of Neb. Rev. Stat. § 77-1842 (Reissue 1981), and therefore Brown must overcome the presumption by evidence greater than her own unsupported statements. Unfortunately, Glebe is simply in error in this regard. It is true that § 77-1842 establishes various presumptions of validity. The difficulty, however, is that the provisions of § 77-1842 have no application in the instant case. Glebe has failed to recognize that there are two separate and distinct methods for the handling of delinquent real estate taxes. One method is set out in Chapter 77, article 18, and deals with what are commonly referred to as "treasurer's certificates" or "treasurer's deeds." See Neb. Rev. Stat. §§ 77-1801 to 77-1863 (Reissue 1981). A second method is contained in Chapter 77, article 19, and

deals with what are commonly referred to as "sheriff's deeds," following a traditional foreclosure. See Neb. Rev. Stat. §§ 77-1901 to 77-1941 (Reissue 1981). The methods are neither the same nor duplicative of each other, and the provisions of Chapter 77, article 18, are not interchangeable with the provisions of Chapter 77, article 19, though Glebe attempts to make them so. Sheriff's deeds are specially covered by §§ 77-1901 et seq. and, unlike the provisions for tax certificates, there is no section establishing a presumption regarding service, as is true in the case of a treasurer's deed. There is no authority in this court to transfer a portion of one statute to another.

Because no presumption as to service is created by statute, the uncontroverted and unimpeached testimony of Brown that she was never served stands unrebutted. That defect is fatal to this action. In *Gage v. Bani,* 141 U.S. 344, 357, 12 S. Ct. 22, 35 L. Ed. 776 (1891), the U.S. Supreme Court, speaking on this matter of evidence of service, said: "[T]he evidence should be clear and convincing that it was given, as required by law . . . ." In the instant case not only is there an absence of any evidence concerning the fact that proper service was had but, rather, the clear and convincing evidence is to the contrary. This requires a holding that the deed held by Glebe is void. A decree of foreclosure of a tax lien is of no effect as against the persons who were, at the time of the foreclosure, in actual possession and who were not made parties defendant in the action and had no notice or knowledge of the suit. See, *Winkle v. Mitera,* 195 Neb. 821, 241 N.W.2d 329 (1976); *Harris v. Heeter,* 137 Neb. 905, 291 N.W. 721 (1940). Absent service on a party in possession, the trial court obtains no jurisdiction over the person and the order is totally void and may be subject to collateral attack. *Sileven v. Tesch,* 212 Neb. 880, 326 N.W.2d 850 (1982). Because the record as presented to us establishes that Brown was never given

notice of the tax foreclosure, as she was entitled to receive, the District Court's order foreclosing the property against Brown and issuing the sheriff's deed was void ab initio. *Winkle v. Mitera, supra.* Because the judgment granting Glebe title by virtue of the sheriff's deed was void ab initio, title to the questioned real estate must be quieted in Brown, the record titleholder. However, because this is an equitable proceeding, we believe Brown must, as a condition of obtaining a decree quieting title to the questioned property in her, pay Glebe the amount of the purchase price paid by Glebe at the void sale, plus interest. See *Loney v. Courtnay,* 24 Neb. 580, 39 N.W. 616 (1888). This she must do within 20 days of the issuance of the mandate in this matter. Due to our holding in this case, we need not consider any other claims made by the parties hereto.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON and CAPORALE, JJ., not participating.

CHAPMAN COMPANY, INC., APPELLEE, V. WESTERN NEBRASKA BROADCASTING CO., INC., ET AL., APPELLANTS.

329 N.W.2d 107

Filed January 14, 1983. No. 81-744.

Brokers. Where a broker and the owner of a business enter into a brokerage agreement which contains an extension clause entitling the broker to the payment of a commission in the event a sale occurs after termination of the brokerage agreement, but during the extension period, to any prospect solicited by the broker during the contract period, the broker must show some minimal causal connection between the efforts of the broker and the ultimate sale before the broker may receive the compensation.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded for a new trial.

Thomas D. Brower and Paul E. Hofmeister of Van

Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellants.

Harris & Lippstreu, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

KRIVOSHA, C.J.

The instant appeal presents to the court a question of first impression concerning the proper interpretation of a broker's contract for the sale of a business. Following trial to a jury a verdict was returned by the jury in favor of the broker, Chapman Company, Inc., and against the owners of radio station KEYR in the amount of $21,650. For reasons which we more particularly set out in this opinion, we believe that the instruction given by the court to the jury was erroneous and therefore the verdict of the jury must be set aside and a new trial granted.

The undisputed record discloses that the appellants, Western Nebraska Broadcasting Co., Inc. (Western), Guy W. Embree (Embree), and Richard W. Baumgartner (Baumgartner), jointly referred to as (Western), owned and operated radio station KEYR in Terrytown, Nebraska. At some point they determined that they wished to sell the station and listed it with the appellee, Chapman Company, Inc. (Chapman), a broker engaged in the business of selling radio stations. In connection with this listing Western signed an exclusive brokerage agreement with Chapman on August 11, 1977. The agreement gave Chapman the exclusive right to sell the stock of Western and gave Western the right to terminate the contract at any time after the contract had been in effect 60 days, upon giving 30 days' notice. The evidence discloses the agreement to be a fairly simple document, setting out that Western was desirous of selling all of its stock for the price of $380,000. Under the terms of the agreement Chapman was likewise to perform certain activities on behalf of

Western for the purpose of selling the stock. The agreement provided for a schedule of compensation to be paid by Western to Chapman in the event of a sale. The agreement further contained a provision which is the issue of this lawsuit. The contract specifically provided that even if the agreement was terminated, "[o]n any sale during the ensuing 12 months to a prospect *solicited* by Broker during the authorization, Broker is to be paid the same commission." (Emphasis supplied.) The agreement does not define the term "solicit," and it is this absence of a definition which causes the difficulty. The provision quoted is what is generally referred to in the trade as an "extension clause" and, according to the evidence, is intended to protect the broker in the event that he obtains a purchaser for the owner and the parties simply delay closing until after the listing agreement expires. See, *Whiting v. Johnson,* 64 Wash. 2d 135, 390 P.2d 985 (1964); Annot., 51 A.L.R.3d 1149 (1973).

The evidence further discloses that in January of 1977 Chapman had been contacted by a James Bickling, who was interested in buying a radio station in the Montana, Minnesota, North Dakota, or South Dakota areas. At this same time Bickling also contacted four other radio station brokerage firms advising them of his interest in purchasing a radio station in that four-state area. On January 24, 1977, he completed and returned Chapman's "buyer outline" form in response to a request for more specific information. Over the next 1½ years, Bickling received numerous mailings from all five brokers with regard to various radio properties. In August of 1977, pursuant to the broker agreement, Chapman initiated a mass mailing to 171 potential buyers, including Bickling, announcing that KEYR was available for purchase. Bickling denies ever receiving this initial offering letter. It is, in any event, undisputed that he made no response to such letter even if, in fact, he received it.

On January 12, 1978, Western notified Chapman of its desire to terminate the listing contract with Chapman, effective March 1, 1978. Following receipt of the notice Chapman sent out a second mass mailing on January 16, 1978, to an additional 152 people, bringing the total number of names on its mass mailing list to 323. This list was later mailed to Western in response to Western's request for a list of "prospects."

On March 16, 1978, Embree and Baumgartner listed KEYR with another radio brokerage firm by the name of Dan Hayslett & Associates. The evidence discloses that, by sheer coincidence, Hayslett had purchased the assets of a brokerage firm that Bickling had contacted in January of 1977. The assets purchased by Hayslett included a mailing list which contained Bickling's name as a potential buyer of radio stations.

On April 3, 1978, Hayslett sent out letters and brochures to buyers it thought might be interested in purchasing KEYR. This mailing was received by Bickling and, according to Bickling's testimony, was the first notice he had that KEYR was for sale. Shortly thereafter, Bickling contacted Hayslett and preliminary negotiations began. The final agreement for the purchase of KEYR was signed on August 28, 1978, and the sale was consummated on November 1, 1978. Chapman admittedly was in no way involved with any of these negotiations or with the completion of the sale of KEYR to Bickling.

In September of 1978 Chapman read of the sale of KEYR in BROADCASTING MAGAZINE. As a result of that, he wrote a letter to Embree and Bickling requesting payment of the broker's commission as provided for in the listing contract. He maintained that Bickling was one of the 323 individuals that Chapman had "solicited" during the term of the agreement and that by reason of the extension clause he was entitled to be paid. Embree and Baumgartner rejected the claim and instead paid

the commission to Hayslett. Thereafter, Chapman instituted this action. While a number of issues are raised, both by Western and by Chapman, the seminal question which must be addressed is whether Chapman "solicited" Bickling within the meaning of the broker agreement so as to entitle Chapman to a commission in the amount of $21,650 when Bickling purchased KEYR from Western through Hayslett. Chapman argues that under the terms of the agreement all Chapman was required to do to earn its commission was to "solicit" or "contact" someone who purchased the station during the 12-month period, even if Chapman had no other contacts with the purchaser. The determination of the question in this case, therefore, depends upon the correctness of the trial court's instruction No. 7. By instruction No. 7, the trial court instructed the jury as follows: "The word 'solicit' means 'to ask, to urge, to appeal (for something), to invite, to try to obtain or to furnish information designed to persuade a person to do a particular act.' 'Solicit' does not imply successful solicitation or require a response. Solicitation does not require any particular form nor does it require a particular degree of earnestness or persistance [sic]." If instruction No. 7 correctly reflects the law in Nebraska, then the verdict of the jury was correct. If, however, the instruction was not correct because the jury needed to be instructed that something more than an unsuccessful and unresponsive solicitation was required, then the verdict must of necessity be set aside. As we indicated at the outset, we believe that the instruction was not correct and therefore the judgment must be set aside.

Investigation discloses that there appears to be no specific Nebraska decision deciding what the word "solicit" in a business brokerage contract of this type means. In construing extension clauses other courts have generally resorted to two approaches in determining whether the broker is entitled to the commission claimed by reason of the "extension

clause." One group, though by far the minority, has taken the position that the broker need only establish that his activities and efforts met or measured up to the conditions specified in or required by the language of the clause in question. These courts have made it clear that the parties to a listing contract are free to frame their agreement in whatever terms they may see fit, provided that such terms are neither unlawful nor contrary to public policy, and that in so doing they may make a broker's right to compensation depend upon the happening of any designated event or upon the fulfillment of any particular set of circumstances, even though neither the event nor the circumstances result in procuring a purchaser. The theory of those cases apparently is that if the owner wishes to impose a greater obligation on the broker, he should specify it in the agreement. See, *Galbraith v. Johnston,* 92 Ariz. 77, 373 P.2d 587 (1962); *Leonard v. Fallas,* 51 Cal. 2d 649, 335 P.2d 665 (1959); *Delbon v. Brazil,* 134 Cal. App. 2d 461, 285 P.2d 710 (1955); *Wright & Kimbrough v. Dewees,* 52 Cal. App. 42, 197 P. 957 (1921); *Moore v. Holman Real Estate Co.,* 129 Ark. 465, 196 S.W. 479 (1917). In essence, this is the position which Chapman convinced the trial court to take and which is now urged upon us.

The majority of the courts, however, have not been willing to accept so unlimited a definition for the word "solicit" in a broker's agreement. Instead, the majority of courts have held that before a broker may be entitled to a commission, the broker must ordinarily be able to establish at least some causal connection between the broker's actions and efforts in regard to the listed property and the ultimate sale made to the purchaser under an extension contract of the type involved herein. While those courts have not gone so far as to require a showing that the broker was the "procuring cause" of the sale, unless the contract contained specific language making it incumbent upon the broker to be the pro-

curing cause, they have required more than just a blanket mailing even to a selected group. The nexus between the broker's efforts and the ultimate sale will vary with the language of the clause in question. In every instance, however, more is required than a mere unresponded to solicitation by mass mailing, as was done in this case. See, *Harkey v. Gahagan,* 338 So. 2d 133 (La. App. 1976); *Lloyd Hammerstad, Inc. v. Saunders,* 6 Wash. App. 633, 495 P.2d 349 (1972); *Korstad v. Hoffman,* 221 Cal. App. 2d 805, 35 Cal. Rptr. 61 (1963); *Mellos v. Silverman,* 367 So. 2d 1369 (Ala. 1979).

As we indicated at the outset, there appears to be no Nebraska case directly on point. In attempting to reach what we perceive to be an appropriate balance between protecting the rights of the broker, on the one hand, under such a "soliciting contract" and yet providing the owner of the property with some reasonable protection, on the other, we believe that the better-reasoned cases by far are those which have required that before a broker may recover for "soliciting" the broker must show some causal relation between his efforts and the ultimate sale. The language of the Louisiana Court of Appeals in the case of *Harkey v. Gahagan, supra* at 135, best explains that reason when it points out: "The purpose of the extension clause in a real estate listing contract is to insure the realtor's right to a fee when the property owner sells the property subject to the listing after the expiration of the primary term to a purchaser who had been located or otherwise interested in the property by the realtor's effort. The realtor does not have to be the procuring cause in order to activate the extension clause. He need not have been involved in active negotiation with the purchaser at the time of the expiration of the primary term. However, his activities must have been the cause of creating some minimal interest in the purchaser which contributed to bringing about the eventual sale." We see little difference between a

contract to sell real estate and a contract to sell a business. We believe that this notion that the broker must have been "the cause of creating some minimal interest in the purchaser" is indeed the appropriate balance between the argument made by Chapman, on the one hand, that consenting adults ought to be permitted to enter into unambiguous agreements as they choose and the argument of appellants, on the other hand, that merely permitting one to send out a mass mailing should be insufficient to constitute a solicitation sufficient to entitle a broker to receive a commission. Obviously, were we to adopt the position taken by Chapman, and apparently accepted by the trial court, every broker need only send out a letter to every individual on a mass mailing list and thereafter be protected from any sale which might occur during the extension period. We believe that such a rule would serve no useful purpose and would only burden the owner's right to dispose of his property in spite of the original broker's inability to provide an interested buyer. We believe that the minimal contact rule is the rule which provides the best balance, and we now adopt that rule for this jurisdiction. The rule, therefore, in this jurisdiction is to the effect that where a broker and the owner of a business enter into a brokerage agreement which contains an extension clause entitling the broker to the payment of a commission in the event a sale occurs after termination of the brokerage agreement, but during the extension period, to any "prospect solicited by the broker during the contract period," the broker must show some minimal causal connection between the efforts of the broker and the ultimate sale before the broker may receive the compensation. Because of our holding, we must find that the court's instruction No. 7 was erroneous, and therefore we must reverse the judgment and remand this action back to the District Court with instructions to retry the case

in accordance with this decision.

REVERSED AND REMANDED FOR A NEW TRIAL.

CLINTON, J., not participating.

MARIAN G. PFLASTERER, APPELLANT, V. SAM KOLIOPOULOS, APPELLEE.

328 N.W.2d 789

Filed January 14, 1983. No. 81-755.

1. **Res Judicata.** The scope of the res judicata bar encompasses not only the issues actually litigated in the prior proceeding but also those issues which could have been raised; any right, fact, or matter in issue and directly adjudicated in a prior proceeding, or necessarily involved in the determination of such action before a competent court in which the judgment or decree was rendered upon the merits, is conclusively settled by such a judgment and may not again be litigated between the parties or their privies, whether the claim, demand, purpose, or subject matter of the two suits would or would not be the same.
2. _____. A former action bars all those issues which could have been raised upon the same facts sought to be presented in a subsequent action.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Ben F. Shrier, for appellant.

Martin A. Cannon and Cynthia G. Irmer of Matthews, Cannon & Riedmann, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

CAPORALE, J.

This is the third in a series of cases involving the estate of Theodore N. Ganaros, deceased (Ganaros). In the first case, *Pflasterer v. Omaha Nat. Bank,* 201 Neb. 427, 268 N.W.2d 104 (1978), we determined that an agreement existed between Ganaros and his daughter Marian G. Pflasterer, plaintiff-appellant in the instant appeal, to will all but $28,000 of dece-

dent's estate to Pflasterer. We held she was entitled to specific performance of that agreement and impressed a trust on the assets of the estate for Pflasterer's benefit. In the second case, *Omaha Nat. Bank v. Koliopoulos,* 204 Neb. 752, 285 N.W.2d 496 (1979), hereinafter referred to as *Koliopoulos I,* we rejected the executor's effort to set aside the transfer by Ganaros of his 255 shares of the capital stock of Ted's Enterprises, Inc., (all of the shares owned by Ganaros) to his nephew Sam Koliopoulos, the defendant-appellee herein. We stated that Ganaros was competent to carry out his "long-held desire to see that his nephew eventually owned all shares of Ted's Enterprises, Inc." *Id.* at 753-54, 285 N.W.2d at 498. We observed that the subject stock transfer occurred after the making of the contract which we enforced in the first case, and specifically stated we did not decide, the issue not being presented, any rights as between Pflasterer and Koliopoulos.

In this action Pflasterer seeks to impress a constructive trust on the 255 shares of capital stock in Ted's Enterprises, Inc., which were the subject of *Koliopoulos I.* Pflasterer asserts herein that the transfer occurred without adequate consideration, that Koliopoulos was therefore not a bona fide third party purchaser, and thus he should be declared to be a constructive trustee in equity for Pflasterer's benefit. Koliopoulos answered with a number of alternative defenses, including the affirmative defense that, as a result of *Koliopoulos I,* this action is barred by the doctrine of res judicata. The District Court found for Koliopoulos on the general issues of the propriety of the transfer of the capital stock; the sufficiency of consideration, if required; and the presence or absence of intent to defraud Pflasterer. The trial court dismissed Pflasterer's petition and this appeal followed.

Pflasterer assigns as error the findings that her father could properly dispose of the stock at issue in

his company during his lifetime without receiving fair and adequate consideration therefor; that the conveyance from her father to Koliopoulos did not constitute a fraudulent conveyance with an intent to defraud; and, finally, that there was fair and adequate consideration to support the transfer at issue.

We conclude, for the reasons set forth hereinafter, that this case is barred by virtue of the final judgment rendered in *Koliopoulos I*. We, therefore, affirm the trial court's judgment. Such disposition makes unnecessary any consideration of Pflasterer's assignments of error.

The record establishes *Koliopoulos I* was instituted by the executor of Ganaros' estate at Pflasterer's specific and written behest. Not only are the very same shares of capital stock of Ted's Enterprises, Inc., involved in both *Koliopoulos I* and this case, but among the reasons given by Pflasterer to the executor for instituting *Koliopoulos I* and seeking to set aside the transfer was the claim that there existed "no *real* consideration for the transfer." (Emphasis in original.) The *Koliopoulos I* petition alleged, among other things, that there had been no consideration for the transfer and prayed for an order directing Koliopoulos to "deliver, assign, transfer and convey" the shares of capital stock to Pflasterer. The bill of exceptions in *Koliopoulos I*, received in evidence in this case, establishes that although Pflasterer's evidence therein was directed toward her father's mental and physical condition at the relevant times, Koliopoulos' evidence bore on the consideration issue as well, at least to the extent of touching upon the financial condition of Ted's Enterprises, Inc., and the inducements proffered by Ganaros to Koliopoulos at certain relevant times in order to persuade Koliopoulos to return to the business operated by Ted's Enterprises, Inc. However, as will be seen by the body of case law discussed *infra*, it matters not whether the evidence in *Koliopoulos I* actually addressed consideration as an issue.

Our most recent review of the elements of res judicata is found in *Brommer v. City of Hastings,* 212 Neb. 367, 322 N.W.2d 787 (1982). We said therein that the scope of the res judicata bar encompasses not only the issues actually litigated in the prior proceeding but also those issues which could have been raised. We also said that any right, fact, or matter in issue and directly adjudicated in a prior proceeding, or necessarily involved in the determination of such action before a competent court in which the judgment or decree was rendered upon the merits, is conclusively settled by such a judgment and may not again be litigated between the parties or their privies, whether the claim, demand, purpose, or subject matter of the two suits would or would not be the same. In the earlier case of *DeCosta Sporting Goods, Inc. v. Kirkland,* 210 Neb. 815, 316 N.W.2d 772 (1982), we had said that a right or fact in issue and directly adjudicated in an action in which a judgment has been rendered upon the merits is, by that judgment, conclusively settled and may not again be relitigated between the parties and their privies. We also said that, generally, the rule of res judicata is grounded upon public policy requiring a termination of litigation and on the general belief that a person should not be vexed more than once for the same cause of action. In *Vantage Enterprises, Inc. v. Caldwell,* 196 Neb. 671, 244 N.W.2d 678 (1976), we held that a suit on express contract effectively barred a subsequent action on quantum meruit based upon the same facts and evidence. We said therein that to constitute res judicata, the former suit must be founded on the same cause of action as the latter suit and that the general test to determine the identity of causes of action is whether the same evidence will sustain both the present and former actions. The above-cited cases teach that a former action bars all those issues which could have been raised upon the same facts sought to be presented in a subsequent action.

Therefore, if Pflasterer and the executor of Ganaros' estate were privies, or if Pflasterer may be otherwise bound by the bank's action in bringing *Koliopoulos I,* then res judicata will necessarily bar this proceeding. Even if the same issues had not been raised and evidence thereon adduced in both suits, such could have been done since the general aim of *Koliopoulos I* was to set aside the inter vivos transfer of the subject capital stock by the deceased Ganaros to Koliopoulos, and it is that very same result, based upon the very same set of facts, which is sought in the instant case.

Although it is true that Omaha National Bank in *Koliopoulos I* was acting as an executor, for purposes of that suit per se the bank is more properly characterized as having acted as a trustee for the benefit of Pflasterer. This was by virtue of the fact that in *Pflasterer v. Omaha Nat. Bank,* 201 Neb. 427, 268 N.W.2d 104 (1978), we found said bank to be a constructive trustee of the assets of the estate for the benefit of Pflasterer. "It is a well-established principle of law that a trustee, who holds title to property, may defend for the beneficiary; and, when the title is attacked and the trustee defends with the knowledge and consent of the beneficiary, the beneficiary will be concluded by the result of the litigation to the same extent as the trustee is concluded by it. . . . [The beneficiary] is as effectually bound by the decisions in the two former cases as if he had been a party thereto." *Van Etten v. Passumpsic Savings Bank,* 79 Neb. 632, 637, 113 N.W. 163, 165 (1907). Pflasterer not only had knowledge of and gave consent to trustee Omaha National Bank to prosecute *Koliopoulos I* but in fact served an express written demand upon it to so do; she is necessarily bound by that proceeding and may not now litigate issues which could have properly been raised, and in fact were raised, at that time. This is but a variation on the more general principle enunciated in *Drainage District v. Kirkpatrick-Pettis Co.,* 140 Neb.

530, 538, 300 N.W. 582, 587 (1941), in which we stated: " 'In many instances, persons not made nominal parties to the action or proceeding are, nevertheless, represented by such parties, and therefore are, in the absence of collusion, bound by the judgment. . . .' "

In arguing for a contrary result Pflasterer apparently relies on our observation in *Koliopoulos I* that "No issue being here presented as to any rights as between Pflasterer and Koliopoulos, none is decided." 204 Neb. at 755, 285 N.W.2d at 498. Her reliance is misplaced. To say we do not decide an issue which is not presented is not to say that its presentation in a future action may not be barred by applicable legal principles.

AFFIRMED.

CLINTON, J., dissents.

ROBERT B. PLUMB AND ELEANOR M. PLUMB, APPELLEES, V. PHILLIP G. RUFFIN, DOING BUSINESS AS TOWN AND COUNTRY MARKET, APPELLANT.

328 N.W.2d 792

Filed January 14, 1983. No. 81-756.

1. **Restrictive Covenants.** Property owners in a subdivision affected by restrictive covenants are not estopped from preventing a most flagrant violation of those restrictions simply because they had earlier failed to take steps to stop a slight deviation from the strict letter of such restrictions.
2. _____. In determining whether the character of a neighborhood has so changed that the existing restrictive covenants can no longer be enforced, the test ordinarily is whether the original purpose and intention of the parties creating the restrictions are no longer of substantial benefit to the residents. The question is not whether suitable persons will in the future purchase property in the addition, but whether the restrictions still preserve to the addition its character of a residence district.
3. _____. An agreement restricting the use of land in a certain tract, imposed thereon by a common grantor under a general improvement plan, intended for the mutual benefit of all grantees therein,

may be enforced in equity by any subsequent grantee in such tract, who purchased with reliance on the general plan, against any other subsequent grantee taking with notice of the restrictions.

4. **Restrictive Covenants: Injunction.** In a suit brought to enforce restrictive covenants, the plaintiff is entitled to an injunction without a showing of actual damages or that irreparable injury will result from a continued violation of the restrictive clause.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Joseph Polack of Polack & Woolley, P.C., for appellant.

Harry B. Otis of Gaines, Otis, Haggart, Mullen & Carta, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

HASTINGS, J.

The defendant, Phillip G. Ruffin, doing business as Town and Country Market, has appealed from an order of the District Court which enjoined him from constructing a convenience store on his property. Certain protective covenants affecting such property prohibited commercial developments. He assigns as error, first, that the plaintiffs themselves are also in violation of the protective covenants and therefore have no standing in equity to bring this action, and, second, that the property has become commercial in nature notwithstanding the protective covenants.

The plaintiffs, Robert B. and Eleanor M. Plumb, are the owners of Lot 5, Block 6, Rockbrook Heights, an Addition to the City of Omaha, which lot is located at the southeast corner of 108th and Oak Streets. They have been owners of this property since 1959. At that time, they built and have maintained on that property a four-plex living unit which also contains an additional fifth apartment in the basement for the caretaker. The defendant acquired title to Lots 1, 2, 4, and 5, Block 5, Rockbrook Heights, by deed dated November 7, 1980. These

four lots lay directly north of and across Oak Street from the plaintiffs' property. Construction of a convenience-type store and service station, which it is proposed will operate 24 hours per day, was commenced by the defendant. That gave rise to this litigation.

In July of 1955 certain protective covenants affecting Rockbrook Heights Addition were drafted and later filed in the office of the Douglas County register of deeds. As to Lot 5, Block 6, and Lots 1, 2, 4, and 5, Block 5, these properties may be used for schools and playgrounds, single-family dwellings, and three-family or four-family dwellings, "but said lots shall be used or occupied for no other purpose." Lot 3, Block 5, is located immediately north of the defendant's property. It consists of the remainder of Block 5, and is equivalent in size to 10 normal-sized lots. According to the protective covenants it may be used for certain commercial purposes, including retail stores and filling stations.

These various covenants are to run with the land and shall be binding for a period of 25 years, "at the expiration of which time they shall be automatically extended for successive periods of ten (10) years unless they are changed . . . by written agreement among the then owners of a majority of the said lots . . . ." The covenants also specifically authorize any person owning land in the subdivision to bring an action in equity to prevent anyone from attempting to violate any of their provisions.

There also appears of record a partial release and amendment to the protective covenants, the effect of which is to permit commercial use of Lots 1, 2, 4, and 5, Block 5, the defendant's property. Although this instrument is dated August 2, 1955, it was not filed of record until September 12, 1960, some 16 months after the plaintiffs had acquired title to their property.

In an effort to accommodate the plaintiffs, the defendant had proposed to alter his plans so as to place

the improvement mostly on Lots 2 and 4 and leave a portion of Lots 1 and 5, located immediately north of the plaintiffs' property, as a buffer area.

The defendant attempted to show that the neighborhood surrounding the lots in question had changed to such an extent that the original purpose and intention of the parties in creating the restrictions could no longer be accomplished. This consisted of testimony that Lot 3 of Block 5 contained commercial establishments, as did Rockbrook Village Plaza located immediately west and north of the defendant's lots. However, the remaining portions of Rockbrook Heights remain as residential property. There is no evidence in the record that the areas being used as commercial areas are being utilized other than in accordance with the original restrictions made at the commencement of this development.

The defendant's contention that the plaintiffs, by a technical violation of the covenants themselves in permitting a fifth living unit in the basement for a caretaker, have somehow waived enforcement of the covenants against the defendant is answered by *Pool v. Denbeck,* 196 Neb. 27, 241 N.W.2d 503 (1976). In that case this court said: " 'As a rule, nonobjection to trivial breaches of a restrictive covenant does not result in loss of the right to enforce the covenant by injunction, and acquiescence in violations * * * which are immaterial and do not affect or injure one will not preclude him from restraining violations thereof which would so operate as to cause him to be damaged. . . .'

" ' "Plaintiffs are not estopped from preventing a most flagrant violation of the restrictions on account of their theretofore failure to stop a slight deviation from the strict letter of such restrictions." ' " *Id.* at 34, 241 N.W.2d at 507-08.

The defendant cites *Reed v. Williamson,* 164 Neb. 99, 82 N.W.2d 18 (1957), in support of his proposition that where the character of a neighborhood has so changed that the restriction is of no value to the land

intended to be benefited, an injunction will not lie. However, quoted with approval in *Reed* is the following language from *Southwest Petroleum Co. v. Logan,* 180 Okla. 477, 71 P.2d 759 (1937): " 'The test ordinarily is whether the original purpose and intention of the parties creating the restrictions pursuant to the general scheme has been so destroyed by the changed conditions, without fault on the part of those who seek to be relieved, that the restrictions are no longer of substantial benefit to the residents, and the original purpose cannot be reasonably effected by the granting of an injunction. * * * From our examination of the entire record we conclude that the addition still has substantial value to the lot owners for residential purposes. . . . The question is not whether suitable persons will in the future purchase property in the addition, but whether the restrictions still preserve to the addition its character of a residence district.' " *Id.* at 118, 82 N.W.2d at 28-29.

As pointed out earlier in this opinion, there have been no changed conditions; the area has developed as was intended by the original developers of the subdivision, and that part intended to be commercial remains commercial, and that portion designated as residential stays as such.

Again, quoting from *Reed:* " 'It has long been an established principle that an agreement restricting the use of land in a certain tract, imposed thereon by a common grantor under a general improvement plan, intended for the mutual benefit of all grantees therein, may be enforced in equity by any subsequent grantee in such tract, who purchased with reliance on the general plan, against any other subsequent grantee taking with notice of the restrictions.' " *Id.* at 114, 82 N.W.2d at 27.

The defendant also argues that the plaintiffs have failed to adduce any evidence of damages, other than the fact that their bedroom windows will overlook a 24-hour commercial operation. However, as

stated in *Wessel v. Hillsdale Estates, Inc.*, 200 Neb. 792, 799, 266 N.W.2d 62, 67 (1978): " 'Ordinarily, in a suit brought for that purpose, the plaintiff is entitled to an injunction without a showing of actual damages or that irreparable injury will result from a continued violation of the restrictive clause.' "

From a de novo review of the record, we conclude that the judgment of the District Court was correct and is affirmed.

AFFIRMED.

CLINTON, J., not participating.

JOHN L. CRAIG, PERSONAL REPRESENTATIVE OF THE ESTATE OF HERMAN F. DETLEFS, DECEASED, APPELLANT, V. WAYNE KILE AND WILLENE KILE, APPELLEES, THOMAS DETLEFS ET AL., INTERVENORS-APPELLANTS.

JOHN L. CRAIG, PERSONAL REPRESENTATIVE OF THE ESTATE OF HERMAN F. DETLEFS, DECEASED, APPELLANT, V. LAVERNE L. QUADHAMER AND SHIRLEY M. QUADHAMER, APPELLEES, THOMAS DETLEFS ET AL., INTERVENORS-APPELLANTS.

329 N.W.2d 340

Filed January 14, 1983. Nos. 81-760, 81-824.

1. **Undue Influence.** The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are: (1) That the person who executed the instrument was subject to undue influence; (2) That there was opportunity to exercise undue influence; (3) That there was a disposition to exercise undue influence for an improper purpose; and (4) That the result was clearly the effect of such undue influence.
2. _____. It is not mere influence that makes a conveyance unlawful but *undue* influence as established in the law.
3. **Undue Influence: Deeds.** The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance.

4. **Mental Competency: Proof.** In order to set aside an instrument or instruments for want of mental capacity on the part of the person executing such instruments, the burden of proof is upon the party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were executed that he could not understand and comprehend the purport and effect of what he was doing.
5. **Parties: Intervention.** An intervenor may not change the issues but must accept the case as the intervenor finds it.

Appeal from the District Courts for Kearney and Franklin Counties: BERNARD SPRAGUE, Judge. Affirmed.

Rodney A. Osborn of Person, Dier, Person & Osborn, for appellant Craig.

Graten D. Beavers and Knapp, Mues, Sidwell, Anderson, Shofstall & Beavers, and Daniel M. Placzek and Luebs, Dowding, Beltzer, Leininger & Smith, for intervenors-appellants.

Jacobsen, Orr & Nelson, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

KRIVOSHA, C.J.

These two actions were originally filed by the conservator of Herman F. Detlefs to set aside certain deeds made by Detlefs during his lifetime. One deed conveyed title to the northeast quarter of Section 29, Township 5 North, Range 15 West of the 6th P.M., Kearney County, Nebraska, to Wayne Kile, and a second deed conveyed title to the west half of Section 22, Township 4 North, Range 14 West of the 6th P.M., Franklin County, Nebraska, to LaVerne L. Quadhamer and Shirley M. Quadhamer, husband and wife. Detlefs reserved a life estate in each tract of land. Before the actions were completed, Detlefs died and the actions were revived by John L. Craig as personal representative of the estate of Herman F. Detlefs, deceased. Because of the location of the real estate, the Kile action was filed in Kearney

County, Nebraska, and the Quadhamer action filed in Franklin County, Nebraska. However, by stipulation of the parties, the cases were consolidated for trial. The intervenors Thomas Detlefs and Fred Detlefs are the surviving brothers of Detlefs, and the intervenors Thomas G. Schmidt and Bernice L. Ross are a nephew and niece of Detlefs and the children of Detlefs' deceased sister. Following trial to the court, the court entered judgment in favor of Kile and Quadhamer and against the appellant Craig and intervenors-appellants, in effect finding that the deeds executed by Detlefs conveying land to Kile and Quadhamer were not the result of either undue influence exerted upon Detlefs or due to the fact that Detlefs was mentally incompetent when the deeds were executed. In reviewing this appeal, we are mindful that as an equity action we are required to examine the record de novo and reach our own independent conclusions without regard to the conclusions reached by the District Court. *Schuller v. Schuller,* 191 Neb. 266, 214 N.W.2d 617 (1974); *McDonald v. McDonald,* 207 Neb. 217, 298 N.W.2d 136 (1980).

These are never easy cases to review, and one must be extremely cautious that in reviewing the record isolated pieces of evidence are not taken out of context. We recognize further that if there is an irreconcilable conflict in a material issue, the Supreme Court will, in determining the issue, consider the fact that the trial court had the opportunity to observe the witnesses and their manner of testifying. *In re Estate of Saathoff,* 206 Neb. 793, 295 N.W.2d 290 (1980).

We have now carefully examined the record and, based upon our own examination of the record, conclude, as the trial court did, that the deeds were not executed by Detlefs at a time when he was incompetent, nor were they the result of undue influence. For that reason, we believe that the judgment of the trial court must be affirmed.

The record discloses that Detlefs, at the time he executed the two deeds on April 11, 1978, was an 80-year-old bachelor living in Upland, Nebraska. He had never married and his only surviving heirs at law were his two brothers, his niece, and his nephew, all of whom Detlefs apparently thought had done quite well and were not in need of assistance from him. As a matter of fact, Detlefs had, prior to conveying the property to Quadhamer and Kile, executed several wills and several codicils. In each will he acknowledged that his sole surviving heirs were his brothers and his niece and nephew, but that "All of them are well provided for and therefore I have concluded that it is advisable for me to make token bequests to each of them . . . ." As a result thereof, Detlefs made certain specific bequests to his family, to several friends and neighbors, including Quadhamer and, later, Kile, and then left the balance of his estate to various charities named in the will. If anything can be gleaned from the various wills and codicils, it would seem to be that Detlefs did not intend to make the intervenors the recipients of the bulk of his estate, and that annually he changed his mind about how his property should be devised upon his death. While this record does establish a picture of a man inclined to change his mind, it does not establish a man either incompetent or easily subject to another's will.

The record discloses that Quadhamer and Kile had known and been friends of Detlefs for a number of years prior to April 11, 1978, and both of them performed personal tasks for Detlefs for which they apparently received little or no compensation. These requests might consist of taking him shopping or to the doctor or driving him to South Dakota to visit his farmland. Detlefs conceded in his deposition taken prior to his death that Kile and Quadhamer were friends of his and performed a number of tasks which he asked them to do. He further conceded that neither Quadhamer nor Kile ever asked him to

convey land to them. Specifically, Detlefs said: "Q. Did Mr. Kile ever ask you to deed any real estate to him? A. No, that I recall. Q. Did Mr. Quadhamer ever ask you to deed real property to him? A. Ask me what? Q. Did he ever ask you to give him some real estate? A. No, they never bothered me about that. . . . Q. Did Laverne Quadhamer or Wayne Kile make any promise to you in order to get you to give them the deed? A. No, they didn't."

While there is some conflict in the evidence, one can find from the evidence that in January of 1975 Detlefs requested Quadhamer to assist him in retaining the services of a lawyer in order to draft a new will. Quadhamer made inquiry of coworkers about attorneys in the Kearney area and was referred to Kent Schroeder, an attorney practicing in Kearney. Subsequently, Mr. Detlefs was taken by Quadhamer to Schroeder's office where, after a conversation between Schroeder and Detlefs, a will was prepared. Subsequently, two codicils, a limited power of attorney, and the two deeds involved herein were prepared by Schroeder for Detlefs. Additional wills and codicils were prepared by attorney William Meier of Minden, Nebraska.

The evidence discloses that in late March or early April of 1978 Detlefs conferred with Schroeder with regard to the possibility of deeding the parcels of real estate involved herein to Quadhamer and Kile to avoid the possibility of an attack on his will. He had earlier provided in either his will or a codicil that the property in question should pass to Quadhamer and Kile upon his death. The evidence discloses that Schroeder requested Quadhamer to leave the room and then discussed at some length with Detlefs the various possibilities, attempting thereby to determine if the decision to deed the property was voluntary on Detlefs' part. The appellants argue that Quadhamer's influence in this matter is clearly established by reason of a note in one of Schroeder's

files indicating that Quadhamer had called Schroeder's secretary to tell her that Detlefs wanted to convey the property to Quadhamer and Kile but reserve a life estate. However, when one examines the entire record one finds that reserving a life estate was one of the possibilities which Schroeder had discussed with Detlefs and which Detlefs was asked to think about and then advise Schroeder. The evidence discloses that it was not uncommon for Detlefs to have Quadhamer make telephone calls for him. Therefore, the evidence concerning the note is not sufficient to establish by clear and convincing evidence that the conveyance was the result of undue influence as alleged by the appellants.

The evidence further discloses that the deeds were then drafted by Schroeder, and Detlefs came back to his office to execute them. Schroeder was not present in the office, but his secretary testified that she reviewed the deeds in detail with Detlefs and asked whether he understood what he was doing. He indicated that he did. He then executed the deeds and asked that they be delivered to the grantees.

On April 24, 1978, on the advice of attorneys William Meier and Jesse Adkins, Detlefs requested the appointment of a conservator, and his petition thereafter was granted. His conservator subsequently instituted these proceedings seeking to have the deeds set aside.

As we indicated at the outset, cases of this nature are not easy to resolve. Nevertheless, there are certain specific standards required to be met. There would be no certainty to conveyances if all that an individual had to do after conveying property was to have a second thought and seek to have the conveyance set aside on the basis that he had been unduly influenced to execute the deeds. In *McDonald v. McDonald,* 207 Neb. 217, 220-21, 298 N.W.2d 136, 138 (1980), we set out the various factors and elements necessary to establish a case of undue influence, saying: " ' "The elements necessary to be estab-

lished to warrant the rejection of a written instrument on the ground of undue influence are: (1) That the person who executed the instrument was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of such undue influence." ' "

We made it clear, however, in the case of *In re Estate of Saathoff,* 206 Neb. 793, 295 N.W.2d 290 (1980), that it is not mere influence that makes a conveyance unlawful but *undue* influence as established in the law. In *Saathoff, supra* at 799, 295 N.W.2d at 295, quoting from the case of *Kolc v. Krystyniak,* 196 Neb. 16, 241 N.W.2d 348 (1976), we said: " '[The] undue influence which will void a . . . (gift) is an unlawful and fraudulent influence which controls the will of the donor.' " Furthermore, in *Saathoff, supra* at 799, 295 N.W.2d at 295, we said: " 'The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance.' " See, also, *Rule v. Roth,* 199 Neb. 746, 261 N.W.2d 370 (1978). The mere fact that there are living relatives who are denied property in favor of friends is not sufficient to set aside a conveyance. "In order to set aside an instrument or instruments . . . for want of mental capacity on the part of the person executing such instruments, the burden of proof is upon the party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were executed that he could not understand and comprehend the purport and effect of what he was doing." *Dunbier v. Rafert,* 170 Neb. 570, 589, 103 N.W.2d 814, 827

(1960). See, also, *McDonald v. McDonald, supra.* Furthermore, we have previously said that mere suspicion, surmise, or conjecture does not warrant a finding of undue influence, but there must be a solid foundation of established facts on which to rest the inference of its existence. This is particularly true where the parties are well aware of the existence of the contested deed shortly after its execution. See *Zych v. Zych,* 183 Neb. 708, 163 N.W.2d 882 (1969).

Intervenors-appellants rely, to a large extent, upon the existence of Detlefs' thyroid condition as the basis for their allegation that he was susceptible to undue influence and was not competent at the time that he executed the deed. However, when one reads his deposition, one is inclined to reach a different conclusion. Detlefs was able to sufficiently describe what took place and to even suggest what the medical cause of his lack of capacity was due to—factors which one truly incompetent is not able to do. Further, Detlefs' physician was not able to testify that, in his opinion, on the day on which the deeds were executed and conveyed Detlefs was either incompetent or acted as a result of undue influence. He indicated that he might be somewhat lethargic or might have some difficulty in reading. At best, however, these were suppositions and fall short of meeting intervenors-appellants' burden. There was simply insufficient evidence to establish by clear and convincing evidence that the action taken by Detlefs in conveying the land to Quadhamer and Kile was not intended by him.

Appellants seek to establish that Schroeder was Quadhamer's lawyer and therefore Detlefs was without independent advice. The record, however, simply does not support that contention. According to Schroeder's own testimony, he had not previously represented Quadhamer and, in fact, the only other work he ever did for Quadhamer was the preparation of a will for Quadhamer and his wife after Detlefs prepared a will leaving the property to

Quadhamer. The record is clear that Schroeder did act as Detlefs' attorney and did carefully go over with him the various actions, satisfying himself that Detlefs understood what he was doing and that he desired to accomplish the results obtained. In *McDonald v. McDonald,* 207 Neb. 217, 223, 298 N.W.2d 136, 139 (1980), we said: " 'The mere fact that the grantee procures an attorney to prepare the deed does not prove that the deed was obtained by improper means.' "

Finally, appellants argue that evidence showing that Quadhamer paid Schroeder's bill as well as the revenue stamps and the filing costs indicates that this was all planned by Quadhamer and Kile and totally unknown by Detlefs. The record simply will not support that claim. The attorney fee for both deeds was $25 and the revenue stamps paid, at least on the Quadhamer property, were $.55. In view of the fact that Detlefs had just given to Quadhamer and Kile real estate of substantial value, one would not be surprised to find that they did not ask Detlefs to reimburse them for these minor costs. While one may question the wisdom of the grantor in conveying his property to Quadhamer and Kile, one cannot say from the evidence that the appellants have established by clear and convincing evidence that at the time the deeds were executed Detlefs was incompetent or that the conveyance was as a result of undue influence.

As a further basis for reversal, intervenors-appellants argue that the trial court erred in refusing to permit them to amend their petition of intervention to add two alleged reasons for setting aside the deeds, to wit, (1) fraud and mistake, and (2) failure of delivery. The trial court was not in error in denying to intervenors their request to amend the petition in intervention for several reasons. In the first instance, an intervenor may not change the issues but must accept the case as the intervenor finds it. *Drainage District v. Kirkpatrick-*

Pettis Co., 140 Neb. 530, 300 N.W. 582 (1941). Furthermore, permitting or refusing amendments to pleadings is a matter within the sound judicial discretion of the trial court, and unless it is made to clearly appear that the court has abused this discretion and the party has thereby been deprived of an opportunity to make his case or defense, the Supreme Court will not interfere. *State ex rel. Sorensen v. Farmers State Bank*, 127 Neb. 139, 254 N.W. 728 (1934); *Omaha & R. V. R. Co. v. Moschel*, 38 Neb. 281, 56 N.W. 875 (1893). In the instant case the record discloses that even though fraud and mistake and failure of delivery were not made specific issues by the pleadings, the matters were gone into at trial and there was evidence that the deeds were ordered delivered by Detlefs. The issues of fraud and mistake were gone into under the issue of undue influence, and we therefore do not believe that the trial court erred in denying to the intervenors their request to amend.

A review of the entire record discloses that there was simply insufficient evidence to establish by clear and convincing evidence that the deeds were executed under either undue influence or while the grantor was incompetent, and the judgment of the trial court should be affirmed.

AFFIRMED.

CLINTON, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DENNIS LINN PARSONS, ALSO KNOWN AS PETER DENNIS LINN, ALSO KNOWN AS PETER PARSONS, APPELLANT.

328 N.W.2d 795

Filed January 14, 1983. No. 82-123.

1. **Miranda Rights: Words and Phrases.** "Custodial interrogation," within the meaning of the *Miranda* rule, means questioning initiated by law enforcement officers after a person has been taken into

custody or otherwise deprived of his freedom of action in any significant way.

2. **Miranda Rights.** Police officers are not required to administer *Miranda* warnings to everyone whom they question, nor is the requirement of warnings to be imposed simply because questioning takes place in the station house or because the questioned person is one whom police suspect.
3. _____. *Miranda* warnings are required only when there has been such a restriction on a person's freedom as to render him in custody.
4. **Confessions.** Voluntary statements made while an individual is in custody but which are not the product of police interrogation are admissible at trial.

Appeal from the District Court for Dawson County: HUGH STUART, Judge. Affirmed.

Dennis Linn Parsons, pro se.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

CLINTON, J.

Defendant Dennis Parsons was charged under Neb. Rev. Stat. § 28-416 (Reissue 1979) with possession of marijuana with intent to distribute, found guilty by a jury, and sentenced to 18 months' to 4½ years' imprisonment. On appeal to this court defendant makes the following assignments of error: (1) The trial court erred in admitting into evidence incriminating statements defendant made to an officer prior to his receiving *Miranda* warnings. (2) The trial court erred in not granting various motions for a directed verdict, as the evidence was insufficient to establish the crime charged. We affirm.

Before considering the assignments of error, we will set forth a summary of the evidence. At the suppression hearing, Gerard Ruiz, a Nebraska State Patrol officer, testified that on October 8, 1981, at about 3 a.m., he picked up the defendant because he was walking on the Interstate. Defendant had been frantically waving to attract the officer's attention.

Defendant told Ruiz that he had been riding in a car with Marvin Huntington, that he jumped out when Huntington said the car held four containers of marijuana, and that Huntington then tried to run over him. Defendant asked the officer to help him; Ruiz took him to the Lexington Police Department so he could sleep, and dispatched information on Huntington's car. The officer testified that, as a sleeper, defendant was locked in a cell so that he could not walk about the jail. He was not under arrest.

About 6 a.m. Huntington was found and brought to the police station, where the defendant briefly confronted Huntington about the attempt to "run him over." The officer testified it appeared a fight might develop and the two were put in separate cells.

Bruce Haney, an investigator for the Nebraska State Patrol, testified that at about 9:20 a.m. he spoke with the defendant and at that time viewed him as the assumed victim. The subject matter of the interview was defendant's accusations against Huntington. After the interview, Haney, unsure if defendant was the victim or a suspect, told the defendant he must stay for further questions and returned him to his cell. Haney next interviewed Huntington, who denied having any marijuana and asked to talk to the defendant. Defendant was brought into the room and Huntington asked the defendant if he had told Haney that there was marijuana in the car. Defendant said he had, and again accused Huntington of trying to run over him. When defendant had left, Huntington admitted he had marijuana in his car but said it belonged to the defendant. As Haney was returning Huntington to his cell, Huntington again told Haney that it was the defendant's fault the marijuana was in the car. Defendant called Haney to come over to his cell, and both Haney and Huntington went to the defendant's cell. Defendant, without being asked any questions,

admitted he was responsible for the marijuana. At that point Haney interrupted the defendant's discussion and read to him the *Miranda* warnings. Huntington, after defendant made the admission, said, "See, I told you that he would talk." The admission above described was received in evidence at the trial and is the basis of defendant's first assignment of error.

At trial, Huntington testified that defendant arranged for them to haul the marijuana north from Texas, that defendant helped load the car, and that defendant had ridden along from Texas. Officer Haney testified that defendant admitted responsibility for the marijuana and that a search of Huntington's car revealed four 5-gallon buckets holding more than 16 pounds of marijuana. Defendant put on no witnesses in his defense.

On the first assignment of error, defendant argues that the trial court should have excluded his statements to Haney because he made those statements prior to receiving *Miranda* warnings and as a result of custodial interrogation.

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), forbids the prosecution from introducing defendant's statements stemming from "custodial interrogation" unless defendant has first been given *Miranda* warnings. The U.S. Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444.

First we examine whether defendant was in custody in the *Miranda* sense. *Oregon v. Mathiason,* 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977), emphasizes that custody under *Miranda* requires restricting one's freedom of movement, for only then does a coercive environment exist which requires *Miranda* warnings. Consequently, a suspect interrogated in a police station who is free to leave is not

in custody. See, also, *United States v. Tobin,* 429 F.2d 1261 (8th Cir. 1970).

Based on the above principle, the evidence would support the conclusion that defendant was not in custody in the *Miranda* sense until Officer Haney ordered him to remain at the station. Until that time, the defendant's freedom was not restricted, for he was considered the assumed victim and free to leave if he so requested. However, defendant was clearly in custody after his first interview with Haney when Haney told him that he had to stay for further questions.

We now look at the question of whether defendant, once in custody, was subjected to interrogation or whether he made the statements voluntarily. If a statement is voluntarily made and not a product of interrogation, it is admissible. *Miranda v. Arizona, supra.* See, also, *United States v. Voice,* 627 F.2d 138 (8th Cir. 1980). *Rhode Island v. Innis,* 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), elaborates on the meaning of interrogation under *Miranda,* stating that *Miranda* applies "not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301. In *Innis, Miranda* rules were extended to the functional equivalent of interrogation. *State v. Bridgeman,* 212 Neb. 469, 323 N.W.2d 102 (1982).

Applying these principles, the evidence is sufficient to support the conclusion that the admission was voluntary and not the consequence of custodial interrogation. It is clear the statement was not made in response to any question by the officer, for no question was asked. Moreover, the record fails to establish that Haney spoke or acted in a manner that would reasonably elicit an incriminating response from the suspect. Hence, the statement was voluntary and thus admissible.

In defendant's second assignment of error, he

claims that the evidence was insufficient to establish the crime charged. A verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Woodruff,* 205 Neb. 638, 288 N.W.2d 754 (1980). Circumstantial evidence to establish that possession of a controlled substance was with intent to distribute or deliver may consist of the quantity of the substance. *State v. Turner,* 192 Neb. 397, 222 N.W.2d 105 (1974). Here, the record supports the verdict; the evidence showed the defendant was in possession, and his possession of 16 pounds of marijuana was sufficient to support a factual finding of his intent to distribute.

AFFIRMED.

ROGER KUBICEK AND THRESA KUBICEK, APPELLEES, V. MIKE SACHS AND AUDREY SACHS, APPELLANTS.

329 N.W.2d 111

Filed January 14, 1983. No. 82-510.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Dan D. Stoller, for appellants.

Roger Kubicek and Thresa Kubicek, pro se.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The court, having reviewed the record, finds that the judgment of the trial court should be affirmed. The judgment is affirmed.

AFFIRMED.

Cite as 213 Neb. 355

THOMAS S. MITCHELL, APPELLANT, V. COUNTY OF DOUGLAS, NEBRASKA, APPELLEE.

329 N.W.2d 112

Filed January 21, 1983. No. 81-613.

1. **Statutes: Legislature.** The court, in considering the meaning of a statute, should, if possible, discover the legislative intent from the language of the act and give it effect.
2. **Statutes.** In construing a statute, the court must look to the objects to be accomplished, the evils and mischiefs sought to be remedied, or the purpose to be served, and place on the statute a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Jerome A. Merwald, for appellant.

Donald L. Knowles, Douglas County Attorney, and Rockford G. Meyer, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

KRIVOSHA, C.J.

The appellant, Thomas S. Mitchell, appeals from an order of the District Court for Douglas County, Nebraska, dismissing Mitchell's petition in error. We affirm.

Mitchell was employed as a deputy sheriff by the County of Douglas. On August 5, 1980, while running a "combat action course," he suffered a myocardial infarction which resulted in his being totally disabled and unable to perform his duties with the Douglas County sheriff's office. Mitchell filed a claim with the county, seeking to obtain coverage for his injury under a specific program established by the county and known as the "Injured on Duty Policy." The policy, adopted by resolution on November 25, 1975, by the Douglas County Board of County Commissioners, specifically provided that if certain conditions were met, members of the Douglas County sheriff's office would be eligible to re-

ceive disability payments equal to 100 percent of their total salary for the first 5 years of disability and 70 percent of their total salary thereafter.

The county board's resolution creating the program specifically provided in relevant part as follows: "WHEREAS: (a) The Douglas County Sheriff's Office is desirous of the County implementing an Injured on Duty Policy for members of the Douglas County Sheriff's Office, such injury causing total disability. (b) To be considered totally disabled the individual must be unable to perform the duties of his occupation and receive no earnings for performing other work or service. (c) The Injured on Duty Plan causing total disability for the Sheriff or one of his Deputies would pertain only to injuries received by employees of the Douglas County Sheriff's Office while performing duties for and in behalf of Douglas County. (d) The Injured on Duty Plan is established for Douglas County Sheriff's employees *only while performing a high-risk duty in the course of their employment.* If there be a discrepancy as to whether or not the injury was received during high-risk duty, a three-man panel is established to make the final determination." (Emphasis supplied.) Neither the resolution nor any supplementary material adopted by the county board defined "high-risk duty." Following Mitchell's injury a dispute developed as to whether Mitchell's injury was due to a "high-risk duty" within the terms of the resolution, and pursuant to the resolution an evidentiary hearing was conducted on March 4, 1981, before the designated panel. On March 17, 1981, the panel concluded that Mitchell's claim should be denied.

The transcript of the hearing before the panel discloses that Mitchell, who was 40 years of age at the time of his heart attack and who weighed 215 pounds, was required on the day in question to negotiate a combat action course, which consisted of running along a designated course and firing a sidearm at various targets. The course was designed to

simulate the stress which an officer might encounter in an emergency situation so that his accuracy with a firearm could be tested under somewhat realistic conditions. The stress was generated by reason of having to fire for accuracy and from peer pressure to perform well. The day that Mitchell ran the course the temperature was in the mid to upper 80s and the humidity was high. He ran the course once without exhibiting any adverse symptoms, but he failed to pass; so he was required, after a rest of 10 minutes or less, to run it a second time. This time he passed, but he began to sweat heavily and complained that he was short of breath. He later went into cardiac arrest and suffered the myocardial infarction.

The first and only issue that we need consider in reviewing this appeal is whether the action of Mitchell in running this combat target-firing course was "high-risk duty" within the meaning of the resolution. If we conclude, as we do, that it was not high-risk duty, then Mitchell was not entitled to additional compensation and the board's action, for whatever reason, was correct. As we indicated at the outset, the county board's resolution does not define "high-risk duty." We are, however, aided by certain rules of construction in attempting to ascertain the meaning of the resolution. We have previously held that this court, in considering the meaning of a statute, should, if possible, discover the legislative intent from the language of the act and give it effect. See, *Freese and Johnson v. County of Douglas,* 210 Neb. 521, 315 N.W.2d 638 (1982); *Otto v. Hahn,* 209 Neb. 114, 306 N.W.2d 587 (1981). We are furthermore advised that one of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give it effect. See *Seldin Development & Management Co. v. Chizek,* 208 Neb. 315, 303 N.W.2d 300 (1981). Also, in construing a statute, this court must look to the objective to be accomplished and the purpose to be

served, and place on it a reasonable construction which will best effect its purpose rather than a construction which will defeat it. *West Nebraska General Hospital v. Hanlon,* 208 Neb. 173, 302 N.W.2d 694 (1981). And, finally, in construing a statute, this court must look to the objects to be accomplished, the evils and mischiefs sought to be remedied, or the purpose to be served, and place on the statute a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. *School District of Murray v. Lancaster,* 203 Neb. 109, 277 N.W.2d 558 (1979). We believe that the rules of construction used by this court in interpreting legislative action are applicable here and of benefit to us in attempting to determine the meaning of the resolution adopted by the Douglas County board.

In our opinion, the resolution was not intended to either eliminate or duplicate the general workmen's compensation laws of the State of Nebraska applicable to employees of the Douglas County sheriff's office. We must therefore conclude that the county board, in adopting the resolution in question, was attempting to provide some benefit for employees of the Douglas County sheriff's office which would be other or different than that which they would normally have received by reason of their employment under the workmen's compensation laws, and which was intended to provide them with an additional benefit because of doing something more than performing their normal and routine duties. We believe that is the reason the Douglas County board, in adopting the resolution, limited coverage to the sheriff's employees to "only while performing a high-risk duty in the course of their employment." Obviously, if the resolution was intended to cover work normally performed in the course of their employment, it would have been unnecessary to have included the phrase "high risk."

One may argue that just being a deputy sheriff is high risk. Yet, the resolution required that the in-

jury be the result of performing a "high-risk duty" in the course of their employment. The use of the phrase "high-risk duty in the course of their employment" must mean something more than routine employment duties. The question to be answered, then, is whether running the combat course was a high-risk duty. We find no cases in Nebraska which have defined the phrase "high risk." Nevertheless, in looking at the standard dictionary definition, we find that the term "risk" is defined to mean "to expose to hazard or danger." Webster's Third New International Dictionary, Unabridged (1968). We are therefore required to conclude that, in the first instance, the duty being performed which would entitle Mitchell to payment must be something in the course of employment which exposes the officer to a hazard or danger. The term "high" is likewise defined to mean "at or to a great distance or altitude; far up toward the source; in or to a high position, amount, or degree." *Id.* Reading the words together, then, we would interpret the phrase "high risk" under the resolution to mean exposing one to a greater hazard or danger than one would normally encounter in the course of his employment. We believe an example of such high-risk duty for a police officer might be the pursuit of a fleeing felon or attempting to charge a building where a felon has secured himself and is firing at the officers. These, of course, are intended simply as examples of high risk and not intended in any manner to define the term in its entirety. We believe that running an obstacle course, though indeed it may be stressful, cannot be said to be high risk within the meaning of the county's resolution. There is no great hazard or danger that anyone will return the officer's fire, nor can the officer likely be injured except perhaps by his own careless act or, as here, due to a gradual physical infirmity. We cannot believe that in attempting to provide this extraordinary benefit for the members of the sheriff's department the county board could

have intended the action of an officer in performing on a firing range to be considered a high-risk duty, no matter how stressful the experience might be. We therefore believe that the board appointed in the county board's resolution to determine whether the injury was committed while engaged in a high-risk duty was correct in determining that Mitchell was not injured as a result of a high-risk duty, and the District Court was likewise correct in affirming its action. The judgment of the trial court is therefore affirmed.

AFFIRMED.

CLINTON, J., not participating.

ROBERT L. BASS, M.D., APPELLANT AND CROSS-APPELLEE, V. KENNETH R. DALTON, M.D., APPELLEE AND CROSS-APPELLANT.

329 N.W.2d 115

Filed January 21, 1983. No. 81-803.

1. **Partnerships: Accounting: Appeal and Error.** An action for the dissolution of a partnership and an accounting between partners is one in equity and is reviewed in this court de novo on the record.
2. _____: _____: _____. Imposed upon the Nebraska Supreme Court in such a case is the duty to reach an independent conclusion without reference to the findings of the District Court, bearing in mind and according respect and weight to the trial court's superior position as the original finder of fact.
3. **Contracts.** Words used in a contract must be given their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.
4. _____. A contract must be viewed as a whole.
5. _____. Courts are not free to interpret contracts which are couched in clear and unambiguous language; parties are bound by the terms of a contract even though their intent may be different from that expressed by the agreement.

Appeal from the District Court for Nance County: JOHN C. WHITEHEAD, Judge. Affirmed as modified.

Donald R. Treadway for Treadway & Bird, P.C., for appellant.

Philip T. Morgan for Morgan & Morgan, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

CAPORALE, J.

Plaintiff-appellant, Robert L. Bass, M.D., appeals from the judgment of the District Court distributing certain partnership assets to defendant-appellee, Kenneth R. Dalton, M.D., who cross-appeals, claiming the trial court erred in directing an accounting of the partnership's income, in assessing the expenses of obtaining same to Dr. Dalton, and in the taxation of the costs of suit to him. We affirm as modified.

Dr. Bass assigns as error (1) the trial court's finding that article XVII of the agreement in question was unambiguous, and (2) the distribution of the partnership assets to Dr. Dalton without any compensation to Dr. Bass therefor.

An action for the dissolution of a partnership and an accounting between partners is one in equity and is reviewed in this court de novo on the record. Imposed upon us in such a case is the duty to reach an independent conclusion without reference to the findings of the District Court, bearing in mind and according respect and weight to the trial court's superior position as the original finder of fact. *Von Seggern v. Von Seggern,* 196 Neb. 545, 244 N.W.2d 166 (1976); *Byram v. Thompson,* 154 Neb. 756, 49 N.W.2d 628 (1951).

In 1958 Dr. Bass joined Dr. Dalton in the practice of medicine at Genoa, Nebraska, where the latter had been practicing since the mid-1940s. During the course of their relationship these two physicians entered into three agreements. The last agreement, the one in question, dated October 6, 1965, designates Dr. Dalton as the first party and Dr. Bass as the second party and, to the extent relevant here, provides as follows:

"XVI.

"It is understood and agreed that if first party

shall decide to retire or in the event of his death, second party shall pay first party or his heirs $40,000.00 representing the value and entire interest of the personal property of said first party.

"XVII.

"It is understood and agreed that if said second party decides to terminate this partnership agreement or fails to perform or in the event of his death that all personal property and interests of whatever kind or nature shall revert to party of the first part.

"XVIII.

"It is understood and agreed that the party of the second part shall continue to carry and pay for personally life insurance in the amount of $20,000.00 made payable to the party of the first part and upon the death of the second party the first party will pay over to second party's wife or heirs said $20,000.00, together with an additional $20,000.00 which shall represent and pay for all of second party's interest in the business, including all personal property, accounts receivable, good will and going concern without any further accounting or obligation on the part of the first party."

Dr. Bass voluntarily left the partnership on May 31, 1980.

In his amended petition Dr. Bass sought a dissolution of the partnership, an accounting for and distribution to him of one-half of all the partnership assets, and other equitable relief. In the course of the proceedings Dr. Bass expanded, by motion, his request for an accounting to include the partnership's "interests, profits and outstanding accounts receivable as of May 31, 1980 . . . ."

Dr. Bass' major claim is that article XVII of the agreement, when read with its other provisions, is ambiguous and must be judicially construed. The claim is without merit.

The words used in article XVII must be given their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Bishop*

Buffets, Inc. v. Westroads, Inc., 202 Neb. 171, 274 N.W.2d 530 (1979); *Rogers v. Neiman*, 187 Neb. 582, 193 N.W.2d 266 (1971). It is true, as argued by Dr. Bass, that the contract must be viewed as a whole. *Dockendorf v. Orner*, 206 Neb. 456, 293 N.W.2d 395 (1980). It is also true, however, that courts are not free to interpret contracts which are couched in clear and unambiguous language; parties are bound by the terms of a contract even though their intent may be different from that expressed by the agreement. *Timmerman Bros., Inc. v. Quigley*, 198 Neb. 129, 251 N.W.2d 877 (1977). The clear meaning of article XVII is that, although the consequences would be different if the partnership were terminated by the death or retirement of Dr. Dalton, termination of the partnership by Dr. Bass resulted in setting over to Dr. Dalton the "personal property and interests" of the partnership without compensation to Dr. Bass therefor. Although the use of the word "revert" may not have been as artful as might be desired, it cannot be said that it renders article XVII ambiguous and subject to interpretation. The trial court was entirely correct in this respect.

We next turn our attention to Dr. Dalton's cross-appeal. The undistributed net profits, under the terms of the agreement in question providing that such shall be divided equally between the parties, are not properly an asset of the partnership but, rather, are a debt of the partnership to the partners. See Neb. Rev. Stat. § 67-340 (Reissue 1981). The trial court was therefore correct in ordering an accounting and in directing a distribution to plaintiff of his share of the net profits or income as of May 31, 1980. The accounting was necessary and beneficial to each of the partners. Accordingly, the expense of obtaining same is to be borne equally by the two partners.

In actions of the type presented here, the court may award and tax costs and apportion the same between the parties as it, in its discretion, may deem

right and equitable. Neb. Rev. Stat. § 25-1711 (Reissue 1979). See *Langel Chevrolet-Cadillac v. Midwest Bridge, ante* p. 283, 329 N.W.2d 97 (1983). In view of the fact Dr. Bass did not succeed in supporting his major claim, and in view of the foregoing apportionment of the expense of obtaining the accounting, we determine that Dr. Bass shall pay the costs of this suit.

AFFIRMED AS MODIFIED.

LORI ANN NYE, APPELLEE, V. GEORGE WAYNE NYE, APPELLANT.

329 N.W.2d 346

Filed January 21, 1983. No. 82-045.

1. **Parental Rights.** An effective forfeiture of parental rights may be effected by the indifference of a parent for a child's welfare over a long period of time.
2. **Child Custody.** While it is true that a parent has a natural right to the custody of his child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances. The welfare of a child of tender years is paramount to the wishes of the parent where it has formed a natural attachment for persons who have long been in the relation of parents with the parents' approval and consent.
3. _____. It may be said that a natural parent, who by reason of past conduct and defaults has made it necessary to place a minor child in a situation where such child has formed a natural attachment for persons standing in a parental relationship, has approved of and consented to such relationship and has forfeited his or her natural rights to custody.
4. **Guardians Ad Litem: Fees.** A court has both inherent and statutory authority to appoint a guardian ad litem to protect the interests of a minor child engaged in, or affected by, litigation. Along with such authority goes the authority to award fees for such guardian's services.
5. **Guardians Ad Litem: Fees: Costs.** The allowance of a guardian ad litem's fees and costs is discretionary and depends upon a consideration of all the facts and circumstances.
6. **Costs.** Ordinarily, the successful party is entitled to an award of costs, and it necessarily follows in such cases that payment of the same will be taxed to the unsuccessful party.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Donald B. Fiedler, for appellant.

Hurt, Gallant & Flores, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

HASTINGS, J.

George Wayne Nye, the respondent-appellant, has appealed from an order of the District Court which denied his application for modification of a marriage dissolution decree. He had requested custody of the minor children of the parties. His principal assignment of error is that the decision of the trial court was contrary to law and the evidence. He also complains of the fact that the entire amount of the fee awarded to the guardian ad litem was taxed to him.

On October 6, 1978, the marriage of the respondent and of Lori Ann Nye, the petitioner, was dissolved. The custody of the minor children, Johnny, born October 14, 1973, and Leonard, born January 11, 1977, was granted to the petitioner. This is the second application for change of custody which has been filed by the respondent.

The first application was filed in May of 1980, and a hearing was held on August 1, 1980. Without reviewing the evidence in detail, it is fair to say that it adequately supports a finding that the petitioner, Lori Ann, was not at that time a fit and proper person to have custody of the children. As a matter of fact, the maternal grandfather and stepgrandmother, Leonard and Anna Strand, had commenced guardianship proceedings in August of 1979, and had had the actual physical custody of the children since at least that time. Mrs. Strand testified that the respondent was not notified of that proceeding because, even though she had inquired of the respondent's mother, she did not know where the respondent

was then living. She also insisted that from shortly after the date of the decree in October of 1978 to the present time, the respondent had had no contact with the children, had never called them on the phone, and had not sent any gifts. She did say that the respondent's mother had inquired about the children on many occasions.

According to the testimony of the respondent at this first hearing, he admitted that his mother had taken the children from their home in Scribner, Nebraska, down to St. Louis, Missouri, in June of 1978. He followed them down the next month. He said that no notification was given to Lori Ann or the Strands that the children were going to be taken to St. Louis. According to the respondent, he did not return the children to Nebraska voluntarily even though he knew of the court's order of August 8, 1978, awarding temporary custody to the petitioner. It was not until sometime in November of 1978, as testified to by the respondent, that the petitioner was able to locate him and the children, with the aid of a private investigator, and he surrendered the children upon order of the police.

It also developed at this first hearing that although the respondent had been ordered by the court to pay child support of $25 per week per child, he had paid but $650 voluntarily. As a part of the August 1, 1980, hearing, he was held in contempt of court and ordered placed in the custody of the sheriff until he had purged himself by payment of all support and costs in full. He complied with that order by the payment of $4,100 on August 12, 1980. During the period of time that he had been failing to make child support payments he had spent $2,650 in legal fees in an attempt to gain custody of the children.

It was on the basis of the foregoing record that the District Court entered an order dated August 4, 1980, finding that neither the petitioner nor the respondent was a fit and proper person to have the custody of the children, and ordered legal custody placed in the

court with physical custody awarded to the Strands. No appeal was taken from that order.

In his petition for change of custody filed in July of 1981, the respondent alleged as a change of circumstances that he was now maintaining his support payments on a regular basis. In addition, he alleged his moral fitness, that by reason of his younger age he was better equipped to raise the children than were the grandparents, and that by law his parental rights were superior to those of the grandparents. Hearing was held on that application in October of 1981.

The evidence adduced at that and earlier hearings generally supported the respondent's claim that he had paid his child support regularly and had obtained and exercised rights of visitation. There was no evidence of the moral or physical unfitness of either the respondent or of the grandparents. The home study evaluation of both homes was quite satisfactory.

However, one rather disturbing factor which had occurred prior to the August 1, 1980, hearing was brought out in these later hearings. That had to do with another effort at self-help on the part of the respondent. He testified that, acting upon the advice of a St. Louis lawyer, he came up to Nebraska in October of 1979 and, without telling anyone, took the children from the babysitter and removed them to St. Louis. At that time he knew that the Strands were actually taking care of the children because he had visited them only the week before. Following the unauthorized removal of the children from the State of Nebraska, Mrs. Strand was forced to go to St. Louis and regain custody by means of a habeas corpus proceeding. According to Mrs. Strand, after that incident the respondent did start calling the children on the phone, but did not ask for visitation. However, court-approved visitations apparently were held in the summer of 1980, Christmas of 1980, and the spring or summer of 1981.

Received in evidence as a part of the 1981 hearings was a written report from the Nebraska Psychiatric Institute, dated June 12, 1981. It indicated that there was an attachment by the children to both the grandparents and the father, that the children were doing well and would continue to do well in the grandparents' home, and would benefit from extended visitations with their father. A later report from NPI, dated August 21, 1981, revealed that the children seemed somewhat unhappy about a recently completed visitation in St. Louis with their father. The report, through the staff psychiatrist, concluded that the "boys would do well to continue living with their maternal grandparents, Mr. and Mrs. Strand," and that it would be best to send them to St. Louis for further visits only if they wanted to go, otherwise "for their father to come to Nebraska" for such visits.

In a January 1981 written report the medical director of the Fremont Mental Health Clinic, a licensed psychiatrist, ventured the opinion that the visitations with the father, by the older boy at least, were anxiety producing and had a negative effect on him. He stated in one report: "The visitation privileges granted the natural father by the court may be beneficial for the father but they are seen to be quite detrimental to this child and at the present time it is this facility's feeling that this child could benefit more by termination of such visits." During the course of this same witness' testimony at an April 1981 hearing, although he agreed that much of the negative feelings attributed to the boy as to his visits with his father came from the recitation of Mrs. Strand, he did not change his previous opinion. He did agree on cross-examination that the fact that the boy had been living with his grandmother for the last 6 years and was more or less forced to visit his father might have been one of the factors creating a separation anxiety disorder.

The guardian ad litem, who had been serving in

such capacity from August of 1980 until the October 1981 hearing, testified. He agreed that the respondent had been meeting his support obligations and would be considered a fit parent. He also ventured the opinion that although there may have been a question at one time as to whether it was the respondent or his mother who really wanted custody of the children, he now felt that the respondent truly did care about them and desired their custody. However, the guardian ad litem also stated that in his opinion the best interests of the children would be served by continuing to allow them to reside with the Strands. He based this on the August 21, 1981, report from the NPI staff psychiatrist, previously mentioned, on conversations with the boys as to their personal desires to remain with the grandparents, and because of the natural attachment which they had formed with the Strands through the circumstances of having lived with them all these years.

There is no evidence adversely reflecting upon the ability of the Strands to take care of these children, other than the fact that they are both in their mid-50s and are not the parents. An in-chambers interview with the children, conducted by the court with the approval of counsel, was not particularly startling. Both children indicated that they cared for both their grandparents and their father and, although they wanted to live with the grandparents, did want to visit with their father on occasion.

Based on the above record, the District Court in its findings reviewed the past delinquencies of the respondent as to child support and the two unauthorized efforts at self-help indulged in by the respondent regarding custody of the children. The court then concluded by pointing to the natural attachment that had developed between the children and their grandparents, made necessary because of the past actions of both the petitioner and the respondent, and found that the best interests of the children

would be served by maintaining custody with the Strands, within the jurisdiction of the court. It is this order which the respondent seeks to reverse as being contrary to the established law of Nebraska.

In support of his position, the respondent relies almost exclusively on *Nielsen v. Nielsen,* 207 Neb. 141, 296 N.W.2d 483 (1980). The majority opinion reviewed the prior authorities and stated the guiding principles in determining child custody to be: "Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent.

"The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.

"The right of a parent to the custody of his minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he is shown to be unfit or to have forfeited his superior right to such custody." *Id.* at 149, 296 N.W.2d at 486.

As stated in the dissenting opinion of *Raymond v. Cotner,* 175 Neb. 158, 169, 120 N.W.2d 892, 898 (1963), "in order to permit the child to remain in an established and developed parental relationship with all that that imports," we will not be "forced to strain the evidence in order to find the blood parent 'unfit.' " However, we are not unmindful of the language in *Gray v. Hartman,* 181 Neb. 590, 595-96, 150 N.W.2d 120, 123 (1967), in which we said that "proper concern for the welfare of a child encompasses something more than dutiful adherence to a court's order as to financial support. . . . 'Children are not chattels,' and to entitle one to parental rights he must show something more than mere indicia of title. . . . He appears now as an absolute stranger to

her, and under the guise of concern for her welfare, has no hesitation in seeking to uproot her at an age when she is approaching the threshold of adulthood. An effective . . . forfeiture of parental rights may be effected by the indifference of a parent for a child's welfare over a long period of time."

Also, in *Haynes v. Haynes,* 205 Neb. 35, 39, 286 N.W.2d 108, 110 (1979), we said: "While it is true that a parent has a natural right to the custody of his child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances. The welfare of a child of tender years is paramount to the wishes of the parent where it has formed a natural attachment for persons who have long been in the relation of parents with the parents' approval and consent."

Although the respondent in the present case has not specifically approved or consented to the relationship which has developed between the children and their grandparents, he has, by his past conduct and defaults, not only permitted but practically demanded it. As such, we conclude that he has "forfeited his superior right to such custody" which he might otherwise have possessed, and the best interests of the children require that they remain in the custody of the Strands.

The District Court awarded the guardian ad litem the sum of $1,120 as fees and taxed the same to the respondent as costs of this action. The respondent does not complain of the amount of the fees, but only that it was all taxed to him.

The authority of the court to appoint a guardian ad litem to protect the interests of the minor children cannot seriously be questioned. Neb. Rev. Stat. §§ 38-114 and 42-358 (Reissue 1978). The power of the court to award fees for such guardian ad litem is a necessary incident to the power of appointment. The allowance of fees and costs is discretionary and depends upon a consideration of all the facts and circumstances. *Friedenbach v. Friedenbach,* 204 Neb.

586, 284 N.W.2d 285 (1979). Ordinarily, the successful party is entitled to an award for costs, and it necessarily follows in such cases that payment of the same will be taxed to the unsuccessful party. *Kasparek v. May,* 178 Neb. 425, 133 N.W.2d 614 (1965). We find no abuse of discretion by the trial court in taxing costs as it did.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., not participating.

WHITE, J., concurring.

I remain committed to the position taken in the dissent in *Haynes v. Haynes,* 205 Neb. 35, 286 N.W.2d 108 (1979). However, the conclusion that the father, by his conduct, has in fact abandoned the child is not an unreasonable one, and for that reason I concur in the judgment.

MCCOWN and CAPORALE, JJ., join in this concurrence.

FLORENCE E. NORDBY, APPELLANT AND CROSS-APPELLEE, V. GOULD, INC., A DELAWARE CORPORATION, APPELLEE AND CROSS-APPELLANT.

329 N.W.2d 118

Filed January 21, 1983. No. 82-092.

1. **Workmen's Compensation.** The statutory scheme found in Neb. Rev. Stat. § 48-121 (Reissue 1978) compensates impairments of the body as a whole in terms of employability and loss of earning capacity but compensates impairments of scheduled members on the basis of loss of physical function.
2. _____. The test for determining whether a disability is to a scheduled member or the body as a whole is not the situs of the injury but, rather, the location of the residual impairment.
3. **Workmen's Compensation: Proof.** The plaintiff bears the burden of establishing a causal relationship between the accident and any disability.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Herbert J. Friedman of the Friedman Law Offices, for appellant.

Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

BOSLAUGH, CLINTON, and HASTINGS, JJ., and CAMBRIDGE, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

In this appeal the plaintiff-appellant, Florence E. Nordby, challenges the award on rehearing of the Nebraska Workmen's Compensation Court which awarded plaintiff, among other benefits, a permanent partial disability of her right arm. Plaintiff argues that she suffers a disability of her body as a whole and should have been compensated accordingly. The defendant-appellee, Gould, Inc., cross-appeals, claiming that plaintiff failed to prove a causal connection between the accident arising out of and in the course of her employment and any disability. We affirm the award of the compensation court and dismiss defendant's cross-appeal.

The plaintiff is a 56-year-old married lady with an eighth grade education who has worked as a manual laborer throughout her employment life. She has been employed by the defendant since 1972, and on the date in question worked as an assembler of small metal pieces. While so employed, on February 4, 1980, she slipped and fell, during the course of which, according to the treating orthopedic surgeon, she struck her right elbow, jammed her right shoulder, and landed on her back. Plaintiff testified that during the fall she struck her elbow, shoulder, head, and back.

Subsequent surgery revealed that the fall caused inflammation and degeneration of the right rotator cuff (shoulder muscle), together with fraying and degeneration of the right bicipital tendon. In the orthopedist's opinion these conditions have produced a 15-percent permanent partial disability of plain-

tiff's right shoulder, a 9-percent permanent partial disability of her body as a whole, secondary to the shoulder problem, limiting plaintiff's ability to use her right arm. Tests performed at the request of a private rehabilitation counselor testifying for the plaintiff tended to support the surgeon's opinion that the impairments limit plaintiff's ability to use her right arm. In the opinion of the rehabilitation counselor, plaintiff is now unemployable. Plaintiff testified she experiences shoulder pain and cannot use her right arm for activities such as lifting, reaching, writing, pushing her vacuum sweeper, or playing yard darts. In sum, she testified she has limited use of her right arm and cannot control her right hand. She testified she has no problems with her neck, back, legs, or left arm but lacks confidence in walking because she feels she cannot control her balance as she cannot use her right arm and hand to steady herself.

The statutory scheme found in Neb. Rev. Stat. § 48-121 (Reissue 1978) compensates impairments of the body as a whole in terms of employability and loss of earning capacity but compensates impairments of scheduled members on the basis of loss of physical function. *Goers v. Bud Irons Excavating,* 207 Neb. 579, 300 N.W.2d 29 (1980); *Scamperino v. Federal Envelope Co.,* 205 Neb. 508, 288 N.W.2d 477 (1980); *Jeffers v. Pappas Trucking, Inc.,* 198 Neb. 379, 253 N.W.2d 30 (1977).

The question presented is whether plaintiff's impairment is to her right arm or to her body as a whole. In one sense an impairment of any part of the body is necessarily, to some extent, an impairment of the whole body. The statute, § 48-121, however, requires that we distinguish between scheduled member impairments and nonscheduled body as a whole impairments.

We resolved the means of making the distinction in *Jeffers v. Pappas Trucking, Inc., supra,* wherein the question was whether a hip injury resulted in a

leg or body as a whole disability. We determined the test was not the situs of the injury but, rather, the location of the residual impairment. Since the plaintiff in *Jeffers* not only walked with a limp but also had disabling pain at his beltline and back, we concluded the disability was to the body as a whole. In the instant case, however, the evidence supports a factual finding, inherent in the compensation court's award, that plaintiff's disability is limited to the loss of use of her right arm. That finding of fact has the same force and effect as a jury verdict in a civil case and, being supported by the evidence, will not be disturbed here unless clearly wrong. *Negrete v. Western Electric Co., Inc.*, 212 Neb. 876, 326 N.W.2d 681 (1982); *Goers v. Bud Irons Excavating, supra.* See, also, *Scamperino v. Federal Envelope Co., supra,* wherein we held the evidence supported a finding that a fracture to the right leg which healed with such a deformity as to affect the hip and rest of the body produced a disability of the body as a whole. In this case there is no finding of the development of such unusual and extraordinary conditions which affected the body as a whole.

The defendant is indeed correct in arguing that the plaintiff bears the burden of establishing a causal relationship between the accident and any disability. *Negrete v. Western Electric Co., Inc., supra.* However, defendant errs in relying on *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 313 N.W.2d 248 (1981). The testimony in *Husted* that it was "more likely" than not that the event in question caused the disability was held to be inadequate to establish the element of causation. In the instant case, however, there is no doubt that in the treating orthopedist's opinion the fall caused the disability in question. Defendant's cross-appeal is without merit and is dismissed.

The award of the Nebraska Workmen's Compensation Court on rehearing is affirmed.

AFFIRMED.

CLINTON, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. KEVIN O. KOMOR, APPELLANT.

329 N.W.2d 120

Filed January 21, 1983. No. 82-409.

1. **Sentences: Appeal and Error.** The Nebraska Supreme Court has authority to reduce a sentence when it is excessive and would result in a substantial miscarriage of justice.
2. _____: _____. Only a sentence which is clearly excessive is to be reduced by the Nebraska Supreme Court.
3. _____: _____. The Nebraska Supreme Court will not reduce a sentence imposed within statutory limits absent an abuse of discretion by the trial court.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed as modified.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ.

CAPORALE, J.

Defendant-appellant, Kevin O. Komor, was charged with theft of property having a value in excess of $1,000. Upon pleading guilty, he was sentenced to a term of imprisonment at the Nebraska Penal and Correctional Complex for a period of not less than 1 nor more than 3 years. In this appeal, defendant claims the sentence is excessive. For the reasons hereinafter stated, we agree with defendant and reduce the sentence.

On February 22, 1982, the 18-year-old defendant and two acquaintances, one an adult and the other a juvenile, were in the home of the juvenile acquaintance's mother and her boyfriend or husband. While there, the three decided to steal the husband-boyfriend's stereo set. All three participated in the transaction; the defendant helped the other two carry the set out of the house and load it into a truck.

The set was to be sold and the three were to share equally in the proceeds.

The defendant quit school in the 10th grade, admitted to drug and alcohol use, had neither financial obligations nor employment (he stated he supported his habits by the sale of his blood), and had no prior traffic, juvenile, or adult criminal record. The adult coperpetrator dropped out of the ninth grade, denied drug use, had been employed at the time of his presentence investigation for 3 weeks as a dishwasher, had had prior short-term employment at minimal wages, and had a history of juvenile and adult criminal convictions dating to 1977.

Theft of property having a value in excess of $1,000 is a Class III felony for which the maximum permissible punishment is 20 years' imprisonment, a $25,000 fine, or both such imprisonment and fine; the minimum punishment is imprisonment for 1 year. Neb. Rev. Stat. §§ 28-105, 28-511, 28-518(1) (Reissue 1979).

The adult coperpetrator was sentenced by another division of the same sentencing court to 2 years' probation upon the conditions, among others, that he make restitution for one-half of the "loss incurred" and serve 90 days in the Douglas County Department of Corrections.

During the course of the presentence investigation, defendant failed to properly keep two appointments with the investigating probation officer, and on one occasion, after defendant appeared earlier than scheduled, became upset when told to go home and return at the scheduled time and stormed out of the office. The investigating probation officer then recommended against probation.

Neb. Rev. Stat. § 29-2308 (Reissue 1979) provides this court with authority to reduce a sentence on appeal when said sentence is excessive and would result in a substantial miscarriage of justice. We have held that only a sentence which is clearly excessive is to be reduced, *State v. Orner,* 192 Neb. 523,

222 N.W.2d 819 (1974), and that we will not reduce a sentence imposed within statutory limits absent an abuse of discretion by the trial court, *State v. Cook,* 212 Neb. 718, 325 N.W.2d 159 (1982).

Under the circumstances of this case we conclude defendant's sentence is the result of an abuse of discretion by the trial court, is clearly excessive, and if affirmed on appeal would result in a substantial miscarriage of justice. It appears, in the face of the absence of any prior criminal record and the sentence imposed upon defendant's adult coperpetrator, that the court placed undue reliance upon the recommendations of a piqued functionary conducting the presentence investigation and defendant's less-than-exemplary conduct during that investigation. It may be that the defendant will prove himself incapable of successfully carrying out a sentence of probation; however, we deem that, in view of the treatment accorded defendant's coperpetrator, and especially in view of the fact defendant has no prior criminal record, defendant must in any event be given the opportunity to try. Anything other than that would constitute an impermissible disparity of sentences for identical offenses.

The sentence of the trial court is modifed to one of probation for a period of 2 years upon the same conditions as those imposed upon defendant's coperpetrator, James V. Roberts.

AFFIRMED AS MODIFIED.

Cite as 213 Neb. 379

IN RE TESTAMENTARY TRUST OF CLAIR C. CRISS, DECEASED.

UNITED BENEFIT LIFE INSURANCE COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLANT, V. THE OMAHA NATIONAL BANK, TRUSTEE, APPELLANT AND CROSS-APPELLEE; NINA CARDEN ET AL., APPELLEES AND CROSS-APPELLANTS; CREIGHTON UNIVERSITY, ALSO KNOWN AS CREIGHTON MEDICAL SCHOOL, A CORPORATION, ET AL., APPELLEES AND CROSS-APPELLEES.

329 N.W.2d 842

Filed January 28, 1983. No. 44062.

1. **Trusts: Appeal and Error.** An action to construe a trust indenture will be reviewed in this court de novo on the record.
2. **Wills: Words and Phrases.** A devise to "issue" or "issue of the body" will be construed as meaning lineal descendants, rather than children, in the absence of qualifying words showing a contrary intent.
3. **Wills: Intent.** In order to determine when a class should close under a testamentary disposition, it is necessary to try to ascertain the intent of the testator and, if legally possible, give effect to that intent, determined by a viewing of the entire will.
4. **Wills.** Generally speaking, a will speaks as of the date of death of the testator, and in the absence of anything in the will showing a contrary intention, the number of the class will be determined upon the death of the testator.
5. _____. Whenever the increase in the period of postponement of the closing of a class would render invalid, under the applicable rule against perpetuities, either the disposition of income to the class or part or all of the ultimate disposition of the corpus, then such invalidity is sufficient to prevent the lengthening of the period during which the class can increase in membership.
6. **Wills: Estates.** It is the general rule that in the absence of a controlling equity, or of an express or implied provision in the will to the contrary, where an estate is given to a person for life with a vested remainder in another, the remainder takes effect in possession whenever the prior gift ceases or fails in whatever manner.
7. **Wills: Intent.** A patent ambiguity must be removed by interpretation according to legal principles, and the intention of the testator must be found in the will. In searching for this intention the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.
8. _____: _____. A clause or provision of a will must, if possible, be

so construed as to give effect to the intention of the testator. If doubtful or ambiguous words, in their ordinary literal sense, appear to be inconsistent with plain and unambiguous language in the same clause or sentence, such words will be so construed, if reasonably possible, as to render the whole clause or sentence intelligible and consistent.

9. **Wills: Estates: Property.** One of the primary incidents of ownership of property in fee simple is the right to convey or encumber it. It is the general rule that a testator may not create a fee simple estate to vest at his death and at the same time restrict its alienation. However, this is not to say that such testator may not, in some situations, create economic incentives in his will encouraging the retention of property, without violating the rule condemning restrictions on alienation.
10. **Wills: Estates.** As a general rule, when an attempted prior interest fails under a will because the person to whom it is limited renounces it, succeeding interests are accelerated, with certain minor exceptions.
11. _____: _____. A testator is presumed to know that his widow might elect to take her share of his estate as provided for by statute and renounce any interest under his will.
12. _____: _____. When a widow elects to take her "forced" or statutory share and renounce her interest under her husband's will, she may well be treated as having predeceased her husband, thereby taking no interest under the will.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed.

Flavel A. Wright and Donald Evans of Cline, Williams, Wright, Johnson & Oldfather, for appellant United Benefit.

Joseph J. Vinardi and William A. Day, Jr., of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellant Omaha National Bank.

John E. North and David L. Hefflinger of McGrath, North, O'Malley & Kratz, P.C., for appellees Volunteers of America.

Barlow, Johnson, DeMars & Flodman, for appellees Nina Carden et al.

William Jay Riley of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee Creighton University.

Hird Stryker and Peter J. Vaughn of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., for appellee Hattie B. Munroe Foundation.

Crosby, Guenzel, Davis, Kessner & Kuester, for appellee Leolla Chambers.

Ronald R. Volkmer of McGill, Koley, Parsonage & Lanphier, P.C., guardian ad litem for Florence Home and Fontenelle Home.

Thomas R. Burke, Lyman L. Larsen, and Patricia A. Zieg of Kennedy, Holland, DeLacy & Svoboda, and Frank J. Barrett, for amicus curiae Mutual of Omaha.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, and HASTINGS, JJ.

HASTINGS, J.

The Omaha National Bank (ONB), as trustee of the testamentary trust of Clair C. Criss, deceased, instituted an action in the county court of Douglas County for an order construing the language of the trust indenture. ONB, United Benefit Life Insurance Company (United), a contingent successor to the remainder interest in the corpus of the trust, and "The issue of Nina Carden," named income beneficiaries under the indenture of trust, appealed from the determination of that court to the District Court for Douglas County. Thereafter, United filed a declaratory judgment action in the District Court based on the same issues as those presented in the county court proceeding. The cases were consolidated for trial in the District Court, which affirmed the decision of the county court and dismissed the declaratory judgment action as being duplicative of the county court proceeding.

We believe that it will be more helpful to an understanding of the nature of this litigation to set forth an outline of the pertinent facts, which are undisputed,

before reciting the errors assigned and discussing the applicable law.

Clair C. Criss died on March 9, 1952, leaving surviving him his widow, Mabel L., but no lineal heirs. His will, which was admitted to probate approximately a month later, had been executed by him on January 16, 1942. By the third paragraph of that will he left to his wife all of his real estate, automobiles, household furniture and furnishings, and certain other items of personal property. All of the remainder of his estate, by the terms of the fourth paragraph of his will, he left to his wife, Mabel L. Criss, and ONB, as trustees. His wife was to be paid the net income from the trust, together with such amounts from the principal or corpus of the trust as ONB in its judgment deemed necessary. These payments were to be made to the decedent's wife "quarter annually for life, or until she, by written instrument filed with the Trustees, renounces her right to receive such income." The will went on to provide that "Upon the death of MABEL L. CRISS, the Trustee hereunder shall forthwith deliver all of the Trust Assets to The Omaha National Bank as Trustee under a certain Indenture of Trust between Mabel L. Criss and The Omaha National Bank, dated 15th day of January, 1942, to be administered according to the original and unmodified terms of said Agreement, and upon such delivery this trust shall terminate."

Under article I of that indenture of trust Mabel L. Criss, during her lifetime, was to be paid from income the sum of $200 per month. Article II, section (a), provided that at the death of the donor, Mabel L. Criss, $200 per month from net income was to be paid to each of the following nine individuals or units: Nina G. Engler; Nina Carden; the issue of Nina Carden, as one unit; Mrs. Deane Criss; Minnie Smith and Stella McDonald, as one unit; Sally Mahoney; Margaret Kunce; Leolla Chambers; and Fannie and Leonard Cross, as one unit. Under arti-

cle II, section (b), $5 per month was to be paid to each of the residents of the Florence Home for the Aged and the Fontenelle Boulevard Home. Under article II, section (c), the remaining income, up to a limit of $10,000 per year, was directed to be paid to Creighton Medical School, the Hattie B. Munroe Home, and the Volunteers of America.

Article III provides that upon the death of all nine of the individual or unit beneficiaries named in article II, section (a), the trust shall either terminate or continue in perpetuity, as the circumstances may dictate. The specific pertinent language is as follows: "Upon the death of all the persons and members of all the units, either named or described by class in Section (a) of Article II, this trust shall forthwith terminate and the principal and all unremitted income . . . shall be . . . conveyed, and assigned to, and shall be the absolute property of the UNITED BENEFIT LIFE INSURANCE COMPANY, Omaha, Nebraska. The foregoing provisions of this Article III are upon condition that there shall have been a continuity of stock ownership of the United Benefit Life Insurance Company from the date of its organization to the date of such delivery of the trust assets to the said Company." Then follows the language that perhaps is the most critical in connection with this appeal: "In the event that more than FIFTY PER CENT of the capital stock of such company shall have been subject to a change of ownership other than that occasioned by death within any five-year period subsequent to the death of the Donor and her husband, Clair C. Criss, then a lack of continuity of stock ownership shall be conclusively presumed. In the absence of such a transfer of Fifty Per Cent (50%) or more of such stock upon the conditions and within the time above stated, a continuity of ownership shall be conclusively presumed." Article III goes on to provide in part that "In the event of a failure of such condition relating to continuity of stock ownership, then upon

the death of such last survivor of Section (a) of Article II hereof, this Trust shall continue in perpetuity for the purposes set out in Sections (b) [residents of Florence Home for the Aged and Fontenelle Boulevard Home] and (c) [Creighton Medical School, Hattie B. Munroe Home, and the Volunteers of America] of Article II hereof, and all of the income after the payment of the amounts required by Section (b) shall annually be distributed to the institutions named in Section (c) of Article II."

United is a capital stock company with which Clair C. and Mabel L. Criss had had a close, lifetime association. At its inception, 20,000 shares of stock were issued. By November 11, 1952, as a result of amendments to its articles of incorporation, United had increased its stock issue to 100,000 outstanding shares. On November 11, 1952, 62,500 of those outstanding shares were transferred by way of a stockholders' agreement to Mutual of Omaha Insurance Company.

Following the admission of the will of Clair C. Criss to probate on April 12, 1952, Mabel L. Criss, on February 17, 1953, filed an election renouncing her interest under that will. According to the terms of the will, this removed her from the testamentary scheme of the will and the trust created thereunder, and, therefore, she no longer had any income interest in her husband's estate.

On January 10, 1955, ONB was appointed sole trustee for the trust created by the will of Clair C. Criss. As trustee, ONB retained the trust property and accumulated the income therefrom until April 4, 1978. At that time the trust assets were transferred to ONB as trustee under the trust indenture of January 15, 1942, previously mentioned above. This transfer occurred as a result of the death of Mabel L. Criss on March 19, 1978, changing the trust from that created under the will to that created by the indenture of trust dated January 15, 1942. ONB continued to hold these trust assets until it is deter-

mined which of the parties here involved is entitled to them.

Another critical decision involves the determination of the membership in the class consisting of "The issue of Nina Carden, considered as a unit," i.e., did the class close as of the date of death of Clair C. Criss on March 9, 1952, on the date that Mabel L. Criss filed her renunciation under the will on February 17, 1953, or on the date of death of Mabel L. Criss on March 19, 1978? Nina Carden, who is presently living, had two daughters: Claire Griffin, born on May 1, 1936, and who died on November 17, 1967, and Nina Evans, born on July 19, 1940, and who is still alive. To Claire were born Amy and David, on November 14, 1960, and August 2, 1962, respectively. Nina Evans has four living children, Timothy, twins Michael and Stephen, and Susan, born on October 18, 1962, October 25, 1964, and September 8, 1970, respectively.

In response to the various pleadings filed in county court, that court made the following findings: (1) The condition of continuity of stock ownership in United must occur or fail, and therefore its interest, or that of Creighton, Munroe Home, and Volunteers, as remaindermen, vest, at the death of the last of the nine individual or unit life income beneficiaries under article II, section (a), of the trust indenture; (2) United was a contingent remainderman of article III of the trust indenture, the contingency being the continuity of stock ownership of 50 percent of United's stock, which continuity was destroyed upon the sale of 62.5 percent of United's stock to Mutual of Omaha in November of 1952; (3) Membership in the class of "The issue of Nina Carden" was determined and closed as of the date of death of Clair C. Criss, and subsequently born issue of Nina Carden are not members of that class, thus avoiding any violation of the rule against perpetuities; (4) The continuity of ownership requirement in the indenture of trust does not create an illegal restraint on the alien-

ability of the stock of United; and (5) The nine individual and unit beneficiaries under article II, section (a), of the trust indenture are entitled to the income and increments thereon from the date of death of Clair C. Criss on March 9, 1952, or, in other words, that there should be acceleration of the successor trust to commence at the death of Clair C. Criss.

Upon hearing in the District Court, that court, as previously stated, without making specific findings, determined that the county court possessed jurisdiction to determine the issues presented to it by way of a request for construction of the will and trust indenture. Accordingly, it affirmed the findings and order of the county court, and dismissed the District Court action for declaratory judgment as being duplicative of the county court proceedings.

In its appeal to this court United generally quarrels with the findings and orders of both the county court and District Court, but sets forth the following specific assignments of error: (1) The District Court, rather than the county court, had jurisdiction to hear the declaratory judgment action and therefore the original District Court action should not have been dismissed; (2) The District Court erred in failing to consider the matter de novo on appeal and determine the issues independently of the findings made by the county court; (3) The court erred in closing the class described as "The issue of Nina Carden" on the date of death of Clair C. Criss, thereby excluding all grandchildren of Nina Carden as members of that class; (4) The court erred in refusing to apply the rule set forth in *Askey v. Askey,* 111 Neb. 406, 196 N.W. 891 (1923), and in closing the class of "The issue of Nina Carden" prior to the death of Mabel L. Criss; (5) The court erred in finding that the interest of United was a contingent and not a vested remainder under the rule described in Restatement of Property § 277 (1940); (6) The court erred in finding that the condition which must occur before any interest of Creighton, Munroe Home, and

Volunteers would come into existence did not violate the rule against perpetuities; (7) The court erred in finding that the trust indenture did not unlawfully restrain alienation of United stock; (8) The court erred in determining that a lack of continuity of stock ownership occurred when 62.5 percent of United's stock was transferred to Mutual of Omaha on November 11, 1952, after the death of Clair C. Criss, but before Mabel L. Criss died.

The trustee, ONB, also appealed, objecting only to the order of the lower courts requiring acccleration of the successor trust as of the date of death of Clair C. Criss. Nina Carden and "The issue of Nina Carden" joined in this appeal, both as appellees and cross-appellants, objecting to the closing of the class as of the date of death of Clair C. Criss, thereby excluding all grandchildren of Nina Carden, and to the failure of the trial courts to determine that each required monthly distribution of income to the article II, section (a), income beneficiaries be in the amount of $1,800 per month, regardless of the number of such beneficiaries living at the time of each distribution, rather than being limited to $200 per month to each of the nine individuals or unit members of the class still extant.

Except as noted, we shall attempt to deal with the assignments of error in the order in which they were presented.

JURISDICTION

We need waste no time with this assignment of error inasmuch as the appellant United concedes in its brief that "in any event, it would appear that in this consolidated action the question of the particular jurisdiction involved need not be decided."

DE NOVO REVIEW

Little more attention need be given the second assignment of error. The written judgment order of the District Court recites that the cause came on for trial "upon the appeal de novo from the County Court of Douglas County . . . ." It is only necessary

that we accept the word of the District Court at face value. Furthermore, this matter must be and will be reviewed de novo in this court. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *In re Estate of Layton,* 212 Neb. 518, 323 N.W.2d 817 (1982). Therefore, any error in the method of review by the District Court which might have existed will be cured by our review here.

CLOSING OF THE CLASS OF "THE ISSUE OF NINA CARDEN"

Incorporated in the discussion under this heading are assignments of error numbered (3) and (4), i.e., that the court erred in closing the class on the date of death of Clair C. Criss and erred in refusing to apply the rule set forth in *Askey v. Askey, supra,* by not keeping the class open until the death of Mabel L. Criss.

The effect of closing the class of "The issue of Nina Carden" as of the date of death of Clair C. Criss was to exclude from the benefit of the article II, section (a), income provisions the six great-grandnieces and great-grandnephews of the decedent, born from 8 to 18 years following his death.

The word "issue" is a term of art. The term has been defined as including all lineal descendants. "This court in *Godden v. Long,* 104 Neb. 13, opinion written by Chief Justice Morrissey, held as follows: 'The term "issue," or "lawful issue," in its primary legal sense, means descendants or lineal descendants generally, and not merely children. * * * It is only when it is used in a special instrument, whose context shows that a narrower construction was intended, that its meaning will be limited.'

"The rule in this state and other state and federal jurisdictions seems to be settled that a devise to 'issue' or 'issue of the body' will be construed as meaning lineal descendants, rather than children, in the absence of qualifying words showing a contrary intent." *Wilkins v. Rowan,* 107 Neb. 180, 184, 185 N.W. 437, 439 (1921). However, to permit this class

to remain open and allow in all of the lineal descendants of Nina Carden would violate the rule against perpetuities. This is so because it is entirely possible that additional lineal descendants of Nina Carden might be born later than 21 years after the death of all the "lives in being" which existed at the time of the death of Clair C. Criss. The interest of such descendants thus would not vest, by their birth, within the period permitted under the rule, creating a violation thereof.

In order to determine when the class should close we must try to ascertain the intent of the testator and, if legally possible, give effect to that intent. This intent is to be determined by viewing the entire will. *Olson v. Sampson,* 208 Neb. 18, 302 N.W.2d 32 (1981).

Viewing the will and trust indenture as a whole, there is no express intent evident as to when this class should close. It is clear, however, that in the event a problem arose as to the enforceability of part of this estate plan, the testator nonetheless desired that his plan be effectuated as fully as possible. This intent is evidenced by article XII of the trust indenture: "If any provision of this agreement or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of the agreement and the applicability of such provision to other persons or circumstances shall not be affected thereby."

This being the only intent that can be ascertained from the actual wording of the will and trust indenture, the court must resort to general rules of construction to determine what the testator's intent would be if it had been expressed.

There are several Nebraska cases cited by the various parties touching upon some of the questions presented here. Perhaps the one most nearly in point is *Tiehen v. Hebenstreit,* 152 Neb. 753, 42 N.W.2d 802 (1950). That case involved the interpretation of a will not unlike that with which we are

here concerned. In general terms, the will provided a gift of income from a testamentary trust to the two sons and daughter of testatrix. In the event of the death of either son before he had received a full one-third of the estate, the residue of his income interest was to be paid to his children. A principal question that had to be decided was whether or not the provisions of the will relating to the children of the two sons violated the rule against perpetuities. That is to say, it was possible that either of the two sons might beget additional children after the death of the testatrix, and if such afterborn children would come within the terms of the will, the rule as to vesting within a life in being plus 21 years would be violated.

However, in determining when the class of children should close, this court stated: " 'A will speaks as of the date of the death of the testator.' Brandeis v. Brandeis, *supra.*

. . . .

"This brings us then to the provisions of paragraph Fifth and the remainders given to 'the children * * * or the survivor of them' of George and John. The word 'children' as used here is a bequest or devise to a class. ' "Since a will speaks from the date of the testator's death, the number of the class will, in the absence of anything in the will showing a contrary intention, be determined upon the death of the testator." ' Lacy v. Murdock, 147 Neb. 242, 22 N.W.2d 713.

"As we said in Lacy v. Murdock, *supra,* we find nothing in the will which in any way defines, explains, interprets, or qualifies the word 'children.' Unexplained and given its ordinary meaning, it refers to the children of George and John living at the date of the death of the testatrix." *Id.* at 761, 42 N.W.2d at 806. Construing the class of "children" to close as of the date of death of the testatrix, the court concluded that there was no violation of the rule against perpetuities.

In 51 Harv. L. Rev. 254, 291 (1937), Casner, *Class Gifts to Others Than to "Heirs" or "Next of Kin" Increase in the Class Membership,* we find the following language: "The fact that the rule against perpetuities will be violated if the class is allowed to increase in size until the period of distribution in a particular case undoubtedly may influence some courts to restrict the class to persons born when the instrument takes effect. The theory for such a view is that as between two possible constructions the transferor must have intended the one that will make his disposition valid."

The Restatement of Property § 295 (1940) suggests that a class such as we have here should be held open to afterborn members "unless a contrary intent of the conveyor is found from additional language or circumstances . . . ." In discussing how such a contrary intent may be found or inferred from a disposition, Comment *s* to § 295 continues in part in language not dissimilar to that of Professor Casner: "Whenever the increase in the period of postponement thus made would render invalid, under the applicable rule against perpetuities, either the disposition of income to this class, or part or all of the ultimate disposition of corpus, then such invalidity is sufficient to prevent the lengthening of the period during which the class can increase in membership, otherwise made because of the subject matter of the class gift (see § 243, Comment *o*). A 'contrary intent of the conveyor' is inferred, because postponements merely incident to periodic distributions of income are not an indication of the conveyor's intent to have the class increase meanwhile in membership, sufficiently clear to require the resolution of the ambiguities of the conveyance in a manner invalidating a substantial part of its dispositions." *Id.* at 1603.

Such a view gains added support in this case when taken in light of the savings clause found in article XII of the trust indenture set out verbatim above.

This clause manifests the testator's intent that in case a problem of partial invalidity arose under his will and the trust indenture, his estate plan should nonetheless be effectuated as fully as possible. In order to accomplish this plan as the testator intended, this class must be closed so as to avoid problems with the rule against perpetuities. The intent of the testator to close this class may be inferred from the savings clause set forth above, from the reasoning contained in the Restatement, *supra,* and from the rules laid down in *Tiehen v. Hebenstreit,* 152 Neb. 753, 42 N.W.2d 802 (1950). The decision of the lower courts to close the class of "The issue of Nina Carden" as of the date of death of the testator was correct.

United urges, however, that we should apply the rule set forth in *Askey v. Askey,* 111 Neb. 406, 196 N.W. 891 (1923). In that case the testator left his property for the support of his widow until her remarriage or death, and upon her death, to his grandchildren. The widow elected to take under the laws of descent rather than under the will. The controversy was then between those grandchildren born before the widow's election and those born afterwards. In that case the court concluded, in effect, that it was the intention of the testator that the class consisting of his grandchildren shall not close until the death of his widow. However, a portion of the opinion reads as follows: "It is the general rule that *in the absence of a controlling equity, or of an express or implied provision in the will to the contrary,* where an estate is given to a person for life with a vested remainder in another, the remainder takes effect in possession whenever the prior gift ceases or fails in whatever manner." (Emphasis supplied.) *Id.* at 409, 196 N.W. at 892. We would further note that no problem relating to the rule against perpetuities was present in *Askey,* and, accordingly, no "express or implied provision in the will to the contrary" intervened.

THE COURT ERRED IN FINDING THAT THE INTEREST OF UNITED WAS A CONTINGENT AND NOT A VESTED REMAINDER AND IN FINDING THAT THE CONDITION NECESSARY TO ACTIVATE THE INTERESTS OF CREIGHTON, MUNROE HOME, AND VOLUNTEERS DID NOT VIOLATE THE RULE AGAINST PERPETUITIES.

Combined under this heading are assignments of error numbered (5) and (6).

Having determined the issues concerning the article II, section (a), income beneficiaries in this case, we now turn to the interests of the remaindermen. Although we have previously set forth the terms of article III of the trust indenture relating to the vesting of the remainder interests, it perhaps would be useful to do so again. Article III reads in its entirety: "Upon the death of all the persons and members of all the units, either named or described by class in Section (a) of Article II, this trust shall forthwith terminate and the principal and all unremitted income and reserve shall be forthwith delivered, conveyed, and assigned to, and shall be the absolute property of the UNITED BENEFIT LIFE INSURANCE COMPANY, Omaha, Nebraska. The foregoing provisions of this Article III are upon condition that there shall have been a continuity of stock ownership of the United Benefit Life Insurance Company from the date of its organization to the date of such delivery of the trust assets to the said Company. In the event that more than FIFTY PER CENT of the capital stock of such company shall have been subject to a change of ownership other than that occasioned by death within any five-year period subsequent to the death of the Donor and her husband, Clair C. Criss, then a lack of continuity of stock ownership shall be conclusively presumed. In the absence of such a transfer of Fifty Per Cent (50%) or more of such stock upon the conditions and

within the time above stated, a continuity of ownership shall be conclusively presumed.

"In the event of a failure of such condition relating to continuity of stock ownership, then upon the death of such last survivor of Section (a) of Article II hereof, this Trust shall continue in perpetuity for the purposes set out in Sections (b) and (c) of Article II hereof, and all of the income after the payment of the amounts required by Section (b) shall annually be distributed to the institutions named in Section (c) of Article II. In the event, one or more of the institutions and the alternate, if any named therefor, in said Section (c) shall, in the opinion of the Trustee, cease to exist or to perform the work now done by them, the remaining institutions named in said Section (c) shall receive all of the income that otherwise would have been distributable among the three institutions. In the event all of the said named institutions in Section (c) shall, in the opinion of the Trustee, cease to exist or to perform the work now done by them, the Trustee shall annually distribute said income to such charitable, educational, health or welfare institutions as it, in its exclusive discretion, may select and deem most deserving."

Clearly, this provision creates a condition (continuity of stock ownership) which is to determine who will receive the remainder in this case. Before deciding whether or not this condition has been met, we first need to discuss the interests of the parties.

United contends that this bequest creates in it a vested remainder subject to complete defeasance. United further argues that because its interest is vested, the remainder interests of the charities are barred as an executory interest that might not rest within the lives in being existing at the date of Clair C. Criss' death plus 21 years.

As we stated earlier, the class of "The issue of Nina Carden" closed as to members born after the death of the decedent. This makes all the income beneficiaries of article II, section (a), "lives in

being" at the time of the death of the testator for purposes of this estate plan. At the death of the last of these article II, section (a), income beneficiaries, one group of the potential remaindermen will take the residue of this trust. This being so, the question of whether United's interest is vested or not, or whether the charities are executory or contingent, becomes irrelevant. The interest of United or of the charities must vest by possession at the death of the last income beneficiary, a "life in being." Since the interest of one of these parties must vest by possession within this period, there is no violation of the rule against perpetuities. The only real question remaining is which of these two interests is to receive this remainder in light of the continuity of ownership condition.

CONTINUITY OF STOCK OWNERSHIP

This comprises the eighth and last specific assignment of error of United. However, we will consider it ahead of the seventh assignment because, logically, it should be discussed before the question of whether such requirement in the trust indenture constitutes an unlawful restraint on alienation of stock.

There has been a great deal of argument and briefing devoted to the meaning of the clause regarding the 50 percent transfer of stock in the trust indenture. "In the event that more than FIFTY PER CENT of the capital stock of such company shall have been subject to a change of ownership other than that occasioned by death within any five-year period subsequent to the death of the Donor and her husband, Clair C. Criss, then a lack of continuity of stock ownership shall be conclusively presumed." This clause is ambiguous on its face as to when a transfer of 50 percent of this capital stock will mean the condition has failed or not. Being ambiguous on its face, the clause suffers from a patent ambiguity. When faced with such a problem, we have stated: " 'A patent ambiguity must be removed by interpretation according to legal principles and the intention

of the testator must be found in the will. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. * * * The intention within the ambit of this rule is the one the testator expressed by the language of the will and not an entertained but unexpressed intention.' " *Gretchen Swanson Family Foundation, Inc. v. Johnson,* 193 Neb. 641, 643-44, 228 N.W.2d 608, 610 (1975).

We have also stated with regard to the construction of ambiguous terms: "A clause or provision of a will must, if possible, be so construed as to give effect to the intention of the testator. If doubtful or ambiguous words, in their ordinary literal sense, appear to be inconsistent with plain and unambiguous language in the same clause or sentence, such words will be so construed, if reasonably possible, as to render the whole clause or sentence intelligible and consistent." (Syllabus of the court.) *In re Estate of Creighton,* 91 Neb. 654, 136 N.W. 1001 (1912).

"When there are definite and unambiguous expressions in a will, other expressions that are capable of more than one construction must be so construed, if reasonably practicable, as to harmonize with the plain provisions of the will." *Marsh v. Marsh,* 92 Neb. 189, 195, 137 N.W. 1122, 1124 (1912).

In light of the above-cited authority, it seems we must determine the intent of the testator as contained within the four corners of this will and construe its provisions so as to harmonize them with this intent and with each other. In determining the intent of the testator with regard to the continuity of ownership clause, certain ideas seem clear. This transfer of the trust assets is certainly to occur on the death of the last article II, section (a), income beneficiary. At that time, this trust property will become the property of United, or it will be placed

in perpetual trust for certain charitable institutions. What determines who shall receive this remainder is whether there shall have been a continuity of ownership of 50 percent of the stock of United from the time of its creation until such time when this remainder is delivered to the remainderman or perpetual trust. Stock transfers occasioned by death are excepted from this condition for purposes of changes in ownership. These ideas are unambiguously stated in this will. The question remains: Stock transfers as a result of whose death occurring at what time are not to be considered?

This clause simply states "subject to a change of ownership other than that occasioned by death." The plain meaning of this phrase indicates all transfers which come about as a result of someone's death are not to be considered for the purposes of this condition. This idea is then limited by the language "within any five-year period subsequent to the death of the Donor and her husband, Clair C. Criss." The word "any," as used here, would indicate that more than one 5-year period is contemplated. By contemplating more than one 5-year period, the testator must have intended this to mean that transfers made during a 5-year period after the death of Mabel L. and transfers made during a 5-year period after the death of Clair C., which came about as a result of the death of someone, are not to be considered when determining whether the continuity of ownership condition has occurred or not. To construe this ambiguous phrase in this way, on the one hand, gives a meaning to the terms used therein, while at the same time making it consistent with the other manifestations of the testator's intent. This interpretation is consistent with the idea that some stock transfers are excepted and that there be continuity in ownership of 50 percent of this stock. To construe this language in this fashion keeps the phrase from violating any of the other manifesta-

tions of the testator's intent, and it is therefore adopted by this court.

Was there a transfer of 50 percent or more of the stock in question which has not occurred due to someone's death during a 5-year period following the death of Clair C. and Mabel L. Criss? The record indicates that 62.5 percent of the stock issued by United was transferred by way of a stockholders' agreement on November 11, 1952. While this transfer did occur within a 5-year period following the death of Clair C. Criss, it was not occasioned by someone's death. This transfer came about by reason of an agreement of United's stockholders. This transfer does not fit within the exception stated above. Therefore, the continuity of stock ownership has failed. The trust assets at the death of the last article II, section (a), income beneficiary are to continue in perpetual trust for the benefit of the article II, sections (b) and (c), charities, to be administered according to article III, paragraph 2, of the indenture of trust incorporated into the will of Clair C. Criss, unless such condition created an unlawful restraint on the alienation of United's stock.

RESTRAINT ON ALIENATION

There is no evidence of any illegal restraint on the alienability of this stock due to this clause. At best, the possibility that United would in fact become the remainderman in this case would only create some economic incentive encouraging stockholders to retain their stock. The general rule with regard to improper restraints on alienation is: "One of the primary incidents of ownership of property in fee simple is the right to convey or encumber it. It is the general rule that a testator may not create a fee simple estate to vest at his death and at the same time restrict its alienation. This is because conditions which restrict alienation are repugnant to the very estate the testator has created." *Cast v. National Bank of Commerce T. & S. Assn.*, 186 Neb. 385, 389, 183 N.W.2d 485, 489 (1971).

The continuity of stock ownership clause in no way prevents the stockholders of United from transferring their stock. This doctrine has no application in this case.

ACCELERATION OF INCOME INTERESTS

This is the sole assignment of error raised by the trustee, ONB. It presents the question as to what was the effect of the renunciation by Mabel L. Criss of her interest under the will. Does this renunciation cause the succeeding life income interests to be accelerated? ONB contends that acceleration is inappropriate in this case.

It seems to be agreed that the general rule regarding renunciation in cases such as this calls for an acceleration of any succeeding interests, as stated in the Restatement of Property § 231 (1936): "When an attempted prior interest fails because the person to whom it is limited renounces it, succeeding interests are accelerated except when (a) the terms and circumstances of the limitation manifest a contrary intent (see §§ 232 and 233); or (b) the person renouncing such attempted prior interest effectively claims an interest in derogation of the dispositions sought to be made and thereby causes (i) the application of the attempted prior interest to the satisfaction of the renouncer's new claim; or (ii) the failure of the entire disposition; or (iii) the sequestration of the attempted prior interest in accordance with the rule stated in § 234 (a)." Comment *d* at 964 to that section reads as follows: "Normally renunciation is not manifested until a date subsequent to the time when the creating instrument becomes operative. When, however, such renunciation is manifested, the resulting ineffectiveness operates, for all purposes material in this Chapter, as an ineffectiveness in the inception. This is often described as a case in which the renunciation 'relates back' to the time when the creating instrument became operative."

The trustee points to exceptions to this rule,

arguing that acceleration is inappropriate here. These exceptions are embodied in the Restatement of Property §§ 232 and 233 (1936). Section 232 simply states that succeeding interests should not be accelerated if there is an affirmatively manifested intent that acceleration should not occur in the case of a renunciation. In the present case no such affirmatively expressed intent can be gleaned from this instrument. It has been held by this court that a testator is presumed to know that his widow might elect to take her share of his estate as provided for by statute and renounce any interest under his will. *In re Estate of Stieber,* 139 Neb. 36, 296 N.W. 336 (1941). When a widow elects to take her "forced" or statutory share and renounce her interest under her husband's will, she may well be treated as having predeceased her husband, thereby taking no interest under the will. "When the widow elected to take against the will, the provisions as to her life interest must necessarily be treated as if she had terminated her life estate by death." *McCollum v. McCollum,* 108 Neb. 82, 84, 187 N.W. 783 (1922). Although the holding in *Askey v. Askey,* 111 Neb. 406, 196 N.W. 891 (1923), might seem to contradict such language, such is not the case. Relying upon the further holding in *McCollum, supra,* that the renunciation of the will by the widow will not be allowed to break the testamentary plan further than is absolutely necessary, the *Askey* court simply concluded that, in its opinion, it was not the intention of the testator that "the time of distribution should be accelerated by the happening of some event other than her death, which might terminate her life estate." *Id.* at 410, 196 N.W. at 893.

In light of the foregoing propositions of law, we may assume that Clair C. Criss knew that his wife might renounce under the will. If in such event he intended Mabel L. to be treated as other than predeceasing him, or that these income interests should not be accelerated, the testator would have so

stated. To the contrary, the only intention that can be found in this will is that payment of these income interests is to begin at Mabel L.'s death. Having concluded that her renunciation was tantamount to her death, and finding no intention in the will against acceleration, these income beneficiaries should have begun receiving payments as of the date of death of Clair C. Criss.

The Restatement § 233, *supra,* states that when a prior interest fails because it is renounced, any succeeding interest subject to an unfulfilled condition precedent shall not accelerate until such condition is fulfilled. In this case the only condition precedent to the interests of the income beneficiaries is the death of Mabel L. Criss. Having indulged the presumption the renunciation is tantamount to death, the only condition precedent to the interests of the income beneficiaries is satisfied. Therefore, this section does not preclude acceleration in this case.

Such a result is not only consistent under the general propositions of law set out in the Restatement but also with several prior holdings of this court. See, *Hauschild v. Hauschild,* 176 Neb. 319, 126 N.W.2d 192 (1964); *In re Estate of Stieber, supra.* The interests of the life income beneficiaries and charities set forth in article II, sections (a), (b), and (c), of the trust indenture are therefore accelerated to take effect at the death of Clair C. Criss on March 9, 1952, as set out in the orders of the county court and the District Court.

"CUMULATION" OF ARTICLE II, SECTION (a), BENEFICIARIES' INTERESTS

For want of a better term, we have applied this heading to the remaining claimed error raised in the cross-appeal of "The issue of Nina Carden." Although we have determined that this class does not consist of any of the grandchildren of Nina Carden, the concept argued would apply to all article II, section (a), beneficiaries.

It is contended that not only are those beneficiaries

entitled to a $200-per-month payment from the time of the death of Clair C. Criss but also, under certain circumstances, to additional income as well. Under the theory proffered, the total bequest of income to article II, section (a), beneficiaries, $1,800 per month, is to be divided among those beneficiaries $200 per month to each of the nine individuals or units. When one unit or individual would cease to exist, the remaining existing units or individuals would divide that no longer existing unit's or individual's share. For example, if only five of the nine original beneficiaries set out in article II, section (a), remained today, they would split the $1,800 between them equally each month, thus receiving $360 each per month.

This argument has no support under the plain terms of the trust indenture. The language which determines the payment of income to article II, section (a), beneficiaries reads as follows: "The fractional interest distributable to each of the above named individuals or units shall be determined on the date of each distribution by the number of the above named individuals or units, or survivors of units who are living on such date. If one member of a unit above described shall be deceased, the surviving member or members *of such unit* shall take the share of the deceased member. The payments hereunder shall, however, be limited to the rate of TWO HUNDRED DOLLARS ($200) per month to each individual or unit. Such monthly payments shall not be cumulative until the payments are commenced under Section (b) hereof." (Emphasis supplied.)

When determining the meaning of language used in a will the court must examine the entire will, consider each of its provisions, and give the words used their generally accepted literal and grammatical meaning. *Olson v. Sampson,* 208 Neb. 18, 302 N.W.2d 32 (1981). The clear and literal meaning of the above-quoted language places an absolute limit

of $200 per month on the income which is to be given to each of the article II, section (a), beneficiaries.

From a de novo review of the record as indicated by the foregoing findings, we determine that the judgment of the District Court, affirming the order of the county court, was correct, and it is affirmed.

AFFIRMED.

CLINTON and CAPORALE, JJ., not participating.

IN RE APPLICATION OF ATS MOBILE TELEPHONE, INC. ATS MOBILE TELEPHONE, INC., APPELLANT, V. NORTHWESTERN BELL TELEPHONE COMPANY, CHARLES P. ODEN, DOING BUSINESS AS NEBRASKA RADIO TELEPHONE SYSTEMS, AND THE LINCOLN TELEPHONE AND TELEGRAPH COMPANY, APPELLEES.

330 N.W.2d 123

Filed January 28, 1983. No. 81-593.

1. **Administrative Hearings: Judicial Notice.** In an administrative hearing an agency may take notice of judicially cognizable facts and in addition take notice of general, technical, or scientific facts within its specialized knowledge. However, parties to such hearings will be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed so as to be afforded an opportunity to contest the facts so noticed.
2. _____: _____. An agency may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it during any hearing.
3. _____: _____. Even though the method by which an administrative agency takes notice of facts not presented at the hearing may not be technically correct, if the parties had full and fair opportunity to address that subject by cross-examination or otherwise, they may very well not have been prejudiced or unfairly surprised by the notice of facts taken by the agency.
4. **Evidence: Appeal and Error.** A party who objects to testimony on a particular subject may not later claim that it was prejudiced because it had itself foreclosed inquiry into that subject matter.
5. **Public Service Commission: Appeal and Error.** The determination by the Public Service Commission as to whether the granting or rejecting of an application for service is within the public interest is a matter peculiarly within its expertise and involves a

breadth of judgment and policy determination that will not be disturbed by this court in the absence of a showing that the action of the commission was illegal or arbitrary, capricious, or unreasonable.

6. _____: _____. The striking of the balance between the competing interests of legitimate competition and the protection of the public interest as to the authorization of services regulated by the Public Service Commission are matters of legislative and administrative determination peculiarly resting in the judgment of the commission. The determination of the public interest is one that is peculiarly for the determination of the commission, and if there is evidence to sustain the finding this court cannot intervene.

7. _____: _____. If the record supports a decision by the Public Service Commission that an application for service should not be granted because the area proposed for the service is presently receiving or within a reasonable time will receive reasonably adequate service and that granting the application will create a duplication of facilities and is not in the interest of the public as provided by Neb. Rev. Stat. § 75-604 (Reissue 1981), the mere fact that the commission adds to its findings that to grant the particular application will unnecessarily extend the monopoly of the applicant to another area is not a necessary finding to justify the denial of such application; and although it may be an ill-advised statement, and as such objectionable, it does not constitute reversible error under the circumstances.

8. _____: _____. Whether this court agrees or disagrees with the decision of the Public Service Commission on a particular matter is immaterial because it is not the province of this court to weigh or resolve conflicts in the evidence, or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission, but will sustain the action of the commission if there is evidence in the record to support it.

Appeal from the Nebraska Public Service Commission. Affirmed.

Donald H. Erickson of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellant.

Richard A. Peterson of Peterson, Bowman & Johanns, for appellee Oden.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

HASTINGS, J.

ATS Mobile Telephone, Inc. (hereinafter ATS),

filed an application with the Public Service Commission (hereinafter Commission) on July 28, 1978, for authority to operate a simulcast wide area one- and two-way mobile telephone service. Objections to this application were raised by the appellees, Northwestern Bell Telephone Company, Nebraska Radio Telephone Systems, and The Lincoln Telephone and Telegraph Company. A hearing was held on this matter by the Commission on October 24 through 27, 1978. The Commission found that ATS made an insufficient showing of public need and interest in this service; that the grant of application No. 32450 of Nebraska Radio Telephone Systems, on May 15, 1979, gave adequate service to the proposed area; that to grant ATS additional frequencies on which to operate is not in the best interest of the public; and that to extend ATS' monopoly over the Omaha market to the Lincoln area is not in the best interest of the public. Therefore, ATS' application was denied by order of the Commission on May 5, 1981. For reasons set forth in greater detail below, we affirm the Commission's denial of this application.

ATS presently operates a one- and two-way mobile telephone and paging service for Omaha and the surrounding 35-mile area. It is operating on 17 of the 27 available radio frequencies. ATS' application proposed the offer of a wide area service. In short, this service would offer mobile telephone and paging service in and between Omaha and Lincoln. In order to facilitate this service ATS would construct two signal sending stations, one in Omaha and one in Lincoln. Each station would have an effective range of 35 miles, thus overlapping the distance between Omaha and Lincoln. This system would also offer local service for any user located in Omaha or Lincoln. Both stations would simulcast signals so a party with this service traveling between Omaha and Lincoln could be reached at any point between the two cities. This system would require the use of four more of the remaining few frequencies avail-

able for use in this area under the rules of the Federal Communications Commission.

ATS has assigned a number of errors to the findings of the Commission. It is claimed that there is no basis in the record to support the decision of the Commission; that the Commission considered evidence outside the record; and that the Commission ignored parts of the record. ATS also claims the Commission improperly applied the "public interest" standard when reaching its decision with regard to the extension of ATS' monopoly to the Lincoln area. ATS argues these to be errors by the Commission requiring reversal.

When urging that the Commission relied on matters outside the record, ATS points to two findings the Commission made in paragraph 14 of its opinion and findings, which reads: "14. The expansion into Lincoln at this time by another radio common carrier is simply not warranted. Application No. 32450 was granted by the Commission on May 15, 1979, which established a radio common carrier in Lincoln, Nebraska. This common carrier will be able to serve the needs of transient two-way mobile subscribers in the Lincoln area. The proposed service can now be provided in the Omaha area by applicant and in the Lincoln area by the carrier authorized under Application No. 32450. To authorize an additional service would result in the unnecessary duplication of facilities. There is no evidence to indicate that the existing service is not reasonably adequate or how in any manner the proposed service would be more beneficial than that presently existing."

ATS argues the grant of application No. 32450, that of Nebraska Radio Telephone Systems, and the service to be provided thereby, is not in the record. This, it is claimed, is therefore an improper basis for the decision of the Commission.

Application No. 32450 was filed by Charles Oden and Nebraska Radio Telephone Systems (hereinafter NRTS) on September 23, 1977. NRTS' applica-

tion requested authority to provide one- and two-way mobile service for the Lincoln-Lancaster County area. A hearing was held and the decision of the Commission on that application was pending at the time of ATS' application and hearing.

Whether these matters were properly relied upon by the Commission in its decision depends upon whether or not the Commission may take judicial notice of them. The rule in Nebraska is set forth by the Administrative Procedures Act, Neb. Rev. Stat. § 84-914(5) (Reissue 1981): "An agency may take notice of judicially cognizable fact and in addition may take notice of general, technical, or scientific facts within its specialized knowledge. *Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed.* They shall be afforded an opportunity to contest the facts so noticed. An agency may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it." (Emphasis supplied.) This act applies to the Public Service Commission by definition. "As used in sections 84-901 to 84-916: (1) Agency shall mean each board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules . . . ." Neb. Rev. Stat. § 84-901 (Reissue 1981).

The policy behind this rule is clear. Fair warning of the Commission's intention to take notice of a fact or matter not in evidence must be given to the parties so as to allow them to address the matter in question at their hearing. This prevents any prejudice or surprise to the parties. The parties are to be given a chance to comment on or rebut any evidence considered by the Commission when making its decision.

In this case no specific prior notice was given by the Commission of its intention to take note of this application and the service it would provide. None-

theless, the question remains: Did ATS have a full and fair opportunity at its hearing to present evidence on the point and thereby refute the findings of the Commission on this matter?

First, with respect to the Commission's taking notice of the grant of the NRTS application, the record indicates that there was testimony at the hearing as to the existence of this pending application. Charles Oden, owner and general manager of NRTS, testified at length with regard to his application. ATS had a full opportunity to cross-examine him as to that application and put on any evidence it desired with regard to it. ATS had the chance to rebut and comment on this evidence, as is required by § 84-914. Therefore, we find that even though the Commission's method of taking notice of this granted application may have been technically improper, the policy behind that rule has been fully met. Since ATS had a full and fair opportunity to address the matter of NRTS' application, they have not been prejudiced or unfairly surprised by the Commission's taking judicial notice thereof.

Secondly, as to the Commission's finding on what service would be supplied, the Commission found that the grant of the ATS application would only duplicate existing service provided as a result of the granting of NRTS' application. This, ATS claims, has no support in the record and was therefore an improper basis for the Commission's decision.

This argument fails for two reasons: First of all, there was discussion as to whether this service could be offered by two separate entities. Mr. Johnson, chief witness for ATS, on cross-examination testified that the system as proposed by ATS could be offered by two separate entities, one in Lincoln and one in Omaha. After describing in technical detail the workings of the proposed system, Johnson testified as follows: "Q No, I said, if they were independently owned. If the Omaha transmitter and the Lincoln transmitter are independently owned, and

the system is in all other respects identical, it would function just exactly as you've described it, would it not? A Okay. Let's — this — any one of these boxes could be owned by any third party, and it wouldn't change it, as long as the hardware is still configured in this fashion. I mean — Q The answer to my question, then, is yes. A Yes."

Mr. Charles Oden on direct examination agreed that this system could be operated as ATS proposed and yet owned by two separate entities. "Q Now, Mr. Oden, when Mr. Johnson was on the stand, and testified with respect to his diagrams of the paging system, and the two-way system, he testified, as I recall, that the systems, the respective elements of the systems, did not know who owned them, and that the system could operate under independent ownership. Do you subscribe to that view, or — or do you differ with Mr. Johnson in that respect? A No, I — I agree to that view."

There is evidence in the record supporting the finding that this service could be offered by NRTS if its then pending application No. 32450 was granted. NRTS could operate the Lincoln portion of the system while ATS operated the Omaha segment.

Secondly, ATS' complaint that it was deprived of an opportunity to present evidence on the question of whether or not this service would in fact be provided by NRTS is not correct. ATS did in fact have an opportunity to present such evidence if it had chosen to do so at the hearing. After agreeing that this system could be offered by two separate entities, Mr. Oden was asked: "Q Now, that prompts me then to ask, Mr. Oden, what — do you have any intention or, if your own application is granted, as to your willingness to cooperate with ATS, or any other R.C.C., in terms of providing wide area one and two-way mobile telephone service?" This question opened the area up to full examination before the Commission. If ATS had wished to present evidence on this area to show that NRTS was incapable of

providing the same service which ATS proposed, it could have done so. At this point ATS had a full opportunity to deal with the question, thus giving ATS the opportunity to rebut this matter, as the Administrative Procedures Act's judicial notice statute requires. However, counsel for ATS objected to this question and thereby foreclosed the area to further discussion. ATS now complains that it did not have an opportunity to present evidence on this matter at the hearing, when in fact it was its own objection which kept it from being able to do so.

To remand this case to the Commission for further proceedings would give ATS no greater opportunity than it already has had. It had an opportunity to present evidence on the nature of NRTS' application and NRTS' ability and willingness to supply the service in question. Therefore, ATS has not been prejudiced by this action. No reversible error has been committed.

ATS also contests the Commission's finding that there was not a sufficient showing of public need. In support of this application ATS called a number of witnesses, producing a great deal of testimony and exhibits to show public need. Nine private businessmen testified that they would be interested in utilizing the proposed service in their businesses. Four expert witnesses and Mr. Marc Cohen of the Omaha Chamber of Commerce gave evidence showing a great deal of growth in the economic and residential development of, as well as the travel in, the area between Omaha and Lincoln. Mr. Larry Cale was called to testify as to a survey taken of 2,000 present users of ATS' service, 4,558 members of the general public by direct mailing, 72 people surveyed by telephone, and people responding to an advertisement run in the Lincoln Journal-Star. From this newspaper advertisement and the 6,630 people contacted directly, 425 people responded indicating some interest in the wide area service. Mr. Frank Rizzuto, a certified public accountant and the treas-

urer of ATS, testified as to the financial aspects and feasibility of this proposed service.

The Commission found this showing of need to be insufficient to support the allocation of four more channels to ATS. There was evidence in the record that there are few frequencies left unassigned in this area. The Commission simply found that the number of potential users of this system did not justify the allocation and exclusive use of these four frequencies to this proposed service. The Commission determined that the use of these four frequencies for these few interested people simply is not in the best interest of the public. This is a decision to be made by the Commission and not this court.

"As we have often said, this determination by the Commission is a matter peculiarly within its expertise and involves a breadth of judgment and policy determination that will not be disturbed by this court in the absence of a showing that the action of the Commission was illegal or arbitrary, capricious, and unreasonable. The striking of the balance between the competing interests of legitimate competition and the protection of the public interest are matters of legislative and administrative determination peculiarly resting in the judgment of the Commission. [Citation omitted.] . . . 'The determination of the public interest in such a case is one that is peculiarly for the determination of the commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.' " *Robinson v. National Trailer Convoy, Inc.*, 188 Neb. 474, 475-76, 197 N.W.2d 633, 635 (1972).

ATS also complains the Commission misconstrued the public policy of the state when it found that to extend ATS' monopoly over radio and mobile telephone service in Omaha to the Lincoln area is contrary to the best interest of the public. The Legislature has prescribed by statute what the Commission is to consider in cases such as this. "No person, firm, partnership, corporation, cooperative, or

association shall offer telephone service or shall construct a new telephone line in or extend an existing telephone line into the territory of another telephone company without first making an application for and receiving from the commission a certificate of convenience and necessity, after due notice and hearing under the rules and regulations of the commission. Before granting a certificate of convenience and necessity, the commission must find that (1) the territory in which the applicant proposes to offer telephone service is not receiving reasonably adequate telephone service, (2) that the portion of the territory of another telephone company in which or into which the applicant proposes to construct new lines or extend its existing lines is not and will not within a reasonable time receive reasonably adequate telephone service from the telephone company already serving the territory, or (3) the application is agreeable to the subscriber or subscribers and to both telephone companies involved in the matter, will not create a duplication of facilities, and is in the interest of the public and the party or parties requiring telephone service." Neb. Rev. Stat. § 75-604 (Reissue 1981).

The Commission did consider these matters. The territory involved in this case is receiving reasonably adequate service. The Commission found NRTS is able to offer adequate service to this area. The Commission also found that NRTS can extend the service in question here. Finally, the Commission found that the grant of ATS' application would create a duplication of service. There was evidence to support these findings. As discussed above, the testimony of Johnson and Oden supports the findings that NRTS could offer the service here in question. Also, the grant of NRTS' application now enables it to offer this service in conjunction with ATS. Johnson also testified that the proposed service by ATS would offer local mobile service in Omaha and Lincoln, as well as wide area service. Under NRTS'

presently granted authority, this proposal would also duplicate existing local service in Lincoln.

These findings are sufficient to support the denial of the ATS application under § 75-604. The finding that the extension of ATS' monopoly over the mobile telephone service in Omaha to the Lincoln area is not in the best interest of the public was not a necessary finding by the Commission to justify its denial of this application. While it may or may not be objectionable, it is not necessary to this decision and therefore cannot be seen as reversible error. The other findings of the Commission were sufficient under this statute and were supported by evidence in the record.

As we have uniformly held in the past: " 'Whether we agree or disagree with the decision of the commission, however, is immaterial. It is not the province of this court to weigh or resolve conflicts in the evidence, or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission but will sustain the action of the commission if there is evidence in the record to support it.

" 'The issue of public convenience and necessity is ordinarily one of fact and where there is evidence in the record to sustain the Public Service Commission's order, this court cannot say that it is unreasonable and arbitrary. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Public Service Commission.' " *In re Application of Crusader Coach Lines, ante* p. 53, 58-59, 327 N.W.2d 98, 101 (1982).

Since there is competent evidence to support the findings of the Commission, its decision must be affirmed.

AFFIRMED.

CLINTON, J., not participating.

MURL C. MORROW ET AL., APPELLANTS, V. CITY OF OGALLALA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

329 N.W.2d 351

Filed January 28, 1983. No. 81-636.

1. **Municipal Corporations.** Where a city by its charter is invested with certain powers, or the control and regulation of certain matters, and the charter fails to prescribe or direct the mode of exercise of the power so conferred, the council may act by resolution, and it will be as effectual as would an ordinance passed for the same purpose.
2. **Municipal Corporations: Courts.** Courts will not review or inquire into the legislative acts of municipal boards concerning matters within their power as to whether they acted expediently, wisely, or necessarily. Such are matters of purely legislative function, and not of judicial concern.

Appeal from the District Court for Keith County: KEITH WINDRUM, Judge. Affirmed.

Gregory J. Beal & Associates, P.C., for appellants.

Paul D. Merritt, Jr., of McGinley, Lane, Mueller, Shanahan, O'Donnell & Merritt, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The plaintiffs are owners and lessees of property abutting 1st Street in Ogallala, Nebraska. On January 27, 1981, the city council of the defendant city adopted a resolution prohibiting parking on 1st Street between East G Street and West H Street. U.S. Highway 30 is routed along 1st Street in that area.

This action was commenced to obtain a declaration that the resolution was void and to enjoin its enforcement. The trial court found that the resolution was valid and dismissed the petition. The plaintiffs have appealed.

The principal assignments of error are that the city was required to act by ordinance rather than by

a resolution and that the resolution was arbitrary, capricious, and unreasonable.

The record shows that 1st Street is the principal east-west arterial street in Ogallala, and between East G Street and West H Street Highway 30 is routed along 1st Street. The area in question is in the business district of the city and the plaintiffs own and operate businesses in the area. The plaintiffs are concerned that the ban on parking along the street in front of their businesses will inconvenience their customers and have an adverse effect on their businesses.

By statute the city is authorized to regulate or prohibit parking upon its streets. Neb. Rev. Stat. § 39-697 (Reissue 1978) and § 17-567 (Reissue 1977). The city had provided by ordinance that the council could prohibit parking on any street by resolution.

There is no express statutory requirement that the designation of streets upon which parking is prohibited be made by ordinance. The plaintiffs contend that this requirement is to be inferred. The contention is without merit.

In *McGavock v. City of Omaha,* 40 Neb. 64, 82, 58 N.W. 543, 549 (1894), this court stated the general rule as follows: "Where the law by which the power to do certain acts or to control and regulate certain matters is conferred upon the city through its council or legislative body, by whatever name it may be designated, does not in any manner limit or direct the mode in which the power granted shall be exercised, the council may choose the method, and its exercise of such control may be by resolution or by ordinance, and the passage of a resolution for that purpose is as valid and will have as much force as if it was done by the enactment of an ordinance, although ordinances are generally passed with more formality." See, also, *Lincoln Street R. Co. v. City of Lincoln,* 61 Neb. 109, 84 N.W. 802 (1901); *Weilage v. City of Crete,* 110 Neb. 544, 194 N.W. 437 (1923).

The record shows that a prior resolution, adopted

May 23, 1966, had directed that 1st Street be marked for two lanes of traffic in each direction. The resolution was based on the assumption that because parking on the south side of 1st Street had been prohibited, there was sufficient width for four lanes of traffic.

Between East B Street and West B Street, 1st Street is 52 to 54 feet in width. East of East B Street and west of West B Street, 1st Street is 63 feet in width. The minimum design standards adopted by the Board of Public Roads Classifications and Standards of the State of Nebraska require that traffic lanes for major arterial municipal state highways be 12 feet in width and parallel parking lanes be 10 feet in width. It is apparent that under this standard there could be no parking on 1st Street between East B Street and West B Street if there were to be two lanes of traffic in each direction. A traffic engineer called as an expert witness by the plaintiffs testified that continuity of traffic lanes was a factor in highway safety.

The record indicates that the matter of parking on 1st Street within the area of the business district had been under consideration for some time. On September 25, 1979, the city had requested a traffic study by the state Department of Roads. The Department of Roads reported the results of that study to the city on September 29, 1980.

The Department of Roads recommended that parking be prohibited on 1st Street from approximately West H Street to East G Street. This would permit two lanes of traffic in each direction and would assist in the orderly flow of traffic and accommodate traffic making left turns off of Highway 30. The department further noted that 1st Street could not be marked for four-lane traffic as long as parking was permitted.

The Department of Roads' recommendation was considered at a joint meeting of the city council and planning commission on November 18, 1980, and

again by the commission at a regular meeting on December 2, 1980. The commission recommended to the council that parking be eliminated and 1st Street be made four-lane traffic.

The matter was again considered by the council at a special meeting on January 20, 1981. The chief of police was present at this meeting and recommended that parking be prohibited. A motion was passed directing that a resolution prohibiting parking be prepared. The resolution in question was adopted at a regular meeting on January 27, 1981.

In addition to the recommendation of the Department of Roads, the council and commission had traffic accident surveys and other reports available to it. The council meetings were open to the public and parties in opposition to the resolution were given an opportunity to present their views to the council.

The plaintiffs argue that the adoption of the resolution was arbitrary because there was no evidence that parking was the direct cause of accidents upon 1st Street; the accident rate was approximately the average for other similar streets in Nebraska; and traffic problems in other parts of the city were not given similar consideration by the council.

The wisdom of the resolution is not before us. The resolution is not subject to revision or control by the courts on the ground of inexpediency, injustice, or impropriety. In *Jones v. Village of Farnam,* 174 Neb. 704, 711-12, 119 N.W.2d 157, 162 (1963), we said: " 'The acts of legislative bodies, whether state or municipal, if performed within the prescribed limits, are not subject to revision or control by the courts on the ground of inexpediency, injustice or impropriety. Such are purely functions of legislative power. Neither will the courts take cognizance over matters involving the wisdom or necessity for the enactment of legislation. The legislative body may alone determine whether a certain piece of legislation is needed or advisable for the general government of the people from whom its power ema-

nates. The concern of the courts is as to the limits of the power, and not the manner or method by which the power is sought to be exercised, if kept within the prescribed limits.' " The resolution was presumptively valid and the burden was on the plaintiffs to show by clear and unequivocal evidence that the resolution was invalid. The plaintiffs failed to meet this burden of proof.

The plaintiffs have no proprietary right to the use of the street in front of their businesses for parking. The city was not bound to accept a particular accident rate on 1st Street and was free to take reasonable action in an effort to assist the orderly flow of traffic on Highway 30 through the business district of the city. The record fails to establish that the resolution was arbitrary, capricious, and unreasonable and did not have a substantial relation to public safety and the general welfare.

We have considered the other assignments of error and find that they are without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., not participating.

MARCIA CATANIA, APPELLANT AND CROSS-APPELLEE, V. THE UNIVERSITY OF NEBRASKA, A CORPORATE GOVERNMENTAL BODY, APPELLEE AND CROSS-APPELLANT.

329 N.W.2d 354

Filed January 28, 1983. No. 81-733.

1. **Tort Claims Act: Jurisdiction.** The District Court, sitting without a jury, has exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim defined in the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981).
2. **Tort Claims Act: Appeal and Error.** The findings of the District Court under the State Tort Claims Act will not be disturbed on appeal unless clearly wrong.
3. _____: _____. Where there is a conflict in the evidence, but there is believable evidence to support the findings of the District Court in a claim of this nature, those findings will be affirmed.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Martin A. Cannon of Matthews, Cannon & Riedmann, P.C., for appellant.

John R. Douglas of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

HASTINGS, J.

This is the second appearance of this case on appeal. Our former opinion, found at 204 Neb. 304, 282 N.W.2d 27 (1979), involved a question of venue.

The action was brought by the plaintiff, Marcia Catania, under the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981), against the University of Nebraska, a corporate governmental body, more accurately described as the Board of Regents of the University of Nebraska. From a judgment in favor of the university, and dismissing the plaintiff's petition, the plaintiff has appealed. She assigns as error, generally, that the court held that she had not proven negligence or proximate cause by a preponderance of the evidence. The university has cross-appealed, contending that the District Court should have sustained its demurrer, based on a running of the statute of limitations. However, as will become apparent, it will not be necessary for us to consider the cross-appeal.

"The district court, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim as defined in this act." § 81-8,214.

The findings of the District Court under the State Tort Claims Act will not be disturbed on appeal unless clearly wrong. *Watson v. City of Omaha,* 209 Neb. 835, 312 N.W.2d 256 (1981). Although that case was decided under the Political Subdivisions Tort Claims Act, the same principles are applicable un-

der the State Tort Claims Act. *Cortes v. State,* 191 Neb. 795, 218 N.W.2d 214 (1974). In other words, unless, from an examination of the record, we can say that the university was guilty of negligence as a matter of law proximately causing injury and damages to the plaintiff, we must affirm the action of the District Court.

The plaintiff was a student in a golf class offered by the University of Nebraska. At the time of her alleged accident and injury she was participating in an indoor exercise wherein the students were hitting plastic golf balls. Although the defendant does not concede the fact, and the trial court made no finding in that regard, it may be assumed for the purpose of this appeal that the plaintiff was injured by being struck in the eye by one of these balls hit by a fellow student.

Because of inclement weather, the students were practicing indoors in a gymnasium which was approximately 96 by 102 feet in size. There were 26 students, using irons, who were arranged in an oval-circle formation approximately 10 feet from the walls and 8 feet apart. The balls used were made of plastic and simulated the look of real golf balls as compared to the perforated "whiffle" balls or cotton balls. The balls were hit toward the opposite wall or center of the oval. During the course of the practice session, the plaintiff looked up and saw a white mass and felt a pain in her eye, suggesting that she had been struck by one of these balls. Presumably as a result of that impact, she has sustained a near total loss of vision in that eye.

Several witnesses who qualified as experts in the field of physical education testified at this trial. John Schultz, who possessed a Ph.D. in education, gave as his opinion that the oval formation employed in this case, whereby the students are hitting the plastic-type ball toward each other, was inappropriate. He did concede that the most obvious danger to students was the risk of being struck by a swinging golf club.

However, under the circumstances existing in this situation, he said that he would advocate a formation whereby the students would stand in two rows, back to back, approximately 10 yards apart, facing the opposite wall, and hit the balls to that wall. He testified that he was not aware of any recognized textbook on physical education which mentioned any danger in the use of plastic golf balls.

Janette Sayre, another expert in the field of physical education, who held a doctor's degree in physical education, stated that the principal danger in a golf class is the risk of being struck by a swinging club. In her 37 years of teaching golf, she has used the oval formation and believed that it gave the instructor the best view of the class. She testified that the oval formation had certain safety advantages over other formations in that it kept the students away from each other and minimized the danger from being struck by a swinging golf club. It was her opinion that the formation being used by the university class instructor at the time of the plaintiff's injury conformed to the standards of golf instruction.

The instructor in charge of the university's class at the time in question, Doris O'Donnell, had been teaching golf at the college level for almost 25 years. She had a doctorate in physical education. She testified that she had used the oval formation for teaching golf for a number of years. In her opinion the primary danger in a golf class was from being struck by a swinging club. She believed that the oval formation being utilized at the time of the plaintiff's injury conformed to acceptable standards of physical education standards. It was her opinion that the double line formation suggested by the witness Schultz created a greater danger to students than the oval one employed in this case.

It would serve no useful purpose to set forth in greater detail the specifics of the various experts' testimony. It should be obvious from the above de-

scription that there was a direct conflict in their opinions as to whether or not the class was conducted with due regard for the safety of the students. Certainly there was believable evidence which would support a finding of no negligence on the part of the university. As such, we certainly cannot say that the judgment of the District Court was clearly wrong.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., not participating.

COLE INVESTMENT COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLANTS, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

329 N.W.2d 356

Filed January 28, 1983. No. 81-734.

Municipal Corporations: Claims: Appeal and Error. An appeal from the disallowance of a claim against a city of the primary class is perfected by filing a notice of appeal and bond as provided in Neb. Rev. Stat. § 15-841 (Reissue 1977).

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded for further proceedings.

Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellants.

William F. Austin, City Attorney, and Ernest R. Peo III, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

BOSLAUGH, J.

The plaintiffs appeal from an order of the District Court sustaining the motion of the defendant city to dismiss the plaintiffs' third amended petition.

On May 27, 1980, the plaintiffs filed their "claim" against the city, arising out of the construction of storm sewers in an industrial park pursuant to an executive order of the city authorizing the private construction of the sewers. The claim was denied by the director of finance in a letter to plaintiffs' counsel dated July 2, 1980, which was received by plaintiffs' counsel on July 7, 1980. A notice of appeal and bond were filed with the city clerk on July 8, 1980. A transcript was not requested by the plaintiffs until June 15, 1981, and was filed in the office of the clerk of the District Court on June 18, 1981.

The defendant's motion to dismiss alleged the trial court lacked jurisdiction of the appeal because a transcript of the proceedings before the city had not been filed as required by Neb. Rev. Stat. §§ 15-841 and 23-137 (Reissue 1977), and former Neb. Rev. Stat. § 27-1303 (Reissue 1964).

Neb. Rev. Stat. § 15-842 (Reissue 1977), relating to unliquidated claims against cities of the primary class, provides as follows: "In order to maintain an action for an unliquidated claim, other than a tort claim as defined in section 23-2402, it shall be necessary, as a condition precedent, that the party file in the office of the city clerk within thirty days from the time such right of action accrued a statement of the amount of the claim, giving full name of the claimant, the time, place, nature, circumstances, and cause of the injury or damage complained of. The procedure for the processing and disposition of an unliquidated claim shall be as provided in sections 15-840 and 15-841. No appeal bond shall be required of the city by any court in case of appeal by the city, and judgment shall be stayed pending such appeal."

Neb. Rev. Stat. §§ 15-840 and 15-841 (Reissue 1977) provide as follows: "All claims and accounts payable against the city shall be presented in writing and shall fully and accurately identify the items or services for which payment is claimed. The finance

director shall be responsible for the preauditing and approval of all claims and accounts payable, and no warrant in payment of any claim or account payable shall be drawn or paid without such approval. No claim exceeding the sum of one hundred dollars shall be allowed until published once in a daily newspaper published and of general circulation in the city."

"Any taxpayer of the city, after the allowance in whole or in part of any claim required to be published, or the claimant, after the disallowance in whole or in part of any such claim, may appeal therefrom to the district court of the county in which the city is situated by giving notice of such appeal to the city clerk within three days after such allowance or disallowance and filing with the city clerk within ten days after such decision, a bond in favor of the city, with good and sufficient sureties to be approved by such clerk, conditioned that the appellant shall prosecute such appeal to effect without unnecessary delay and pay all costs that may be adjudged against appellant. In an appeal by a taxpayer in case the claimant finally recovers judgment for as great a sum exclusive of interest as was allowed by the council, such appellant shall pay all costs of such appeal. In an appeal by a claimant in case claimant fails to recover as great a sum exclusive of interest as was allowed by the council, said claimant shall pay all costs. The procedure shall follow the procedure of appeals from the county board to the district court. No warrant shall issue for the payment of any such claim until the appeal is finally determined."

The defendant contends, and the trial court found, that the next to the last sentence of § 15-841 requires that a transcript be filed in the District Court within 30 days. The defendant argues that the language in the statute that "the procedure of appeals from the county board to the district court" adopts by reference the transcript requirement formerly re-

quired in appeals to the District Court from a justice of the peace court. See § 27-1303, repealed in 1972 by § 287 of L.B. 1032.

Section 23-137, relating to appeals from the county board to the District Court, provides for the preparation of a transcript by the clerk of the board, upon the payment of proper fees, and delivery of the transcript to the clerk of the District Court by the clerk of the board. The statute then provides, "and such appeal shall be *entered*, tried, and determined the same as appeals from justice courts . . . ." (Emphasis supplied.) No such language appears in § 15-841.

Section 15-841 provides that a claimant may appeal "by giving notice of such appeal . . . and filing . . . a bond . . . ." We think the reference to "procedure" in § 15-841 relates to matters occurring after the appeal has been perfected and jurisdiction has vested in the District Court.

Neumeyer v. Omaha Public Power Dist., 188 Neb. 516, 198 N.W.2d 80 (1972), involved an appeal in a proceeding in eminent domain. The relevant statute, Neb. Rev. Stat. § 76-715 (Reissue 1981), provided that an "appeal shall be taken by filing a notice of appeal . . . ." We held that the notice of appeal and service of the notice upon all parties bound by the award were jurisdictional, but that the undertaking and transcript were not jurisdictional requirements. We said at 520-21, 198 N.W.2d at 83: "Appellants are required to (1) execute an undertaking with surety and statutory conditions, (2) to do so at the time of filing notice of appeal, and (3) secure the approval of the county judge. These things are to be done in addition to the jurisdictional requirements of sections 76-715 and 76-715.01, R.R.S. 1943. The filing of the undertaking is not provided. There is no clear language relating the execution of the undertaking as a step necessary to vest the district court with jurisdiction and we think none was intended by the Legislature, rather jurisdiction in all eminent do-

main appeal statutes is keyed to the provision in section 76-715, R.R.S. 1943, that such 'appeal shall be taken by filing a notice of appeal.' "

The order sustaining the motion to dismiss was erroneous. The judgment of the District Court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED
FOR FURTHER PROCEEDINGS.

WHITE, J., concurring.

While I concur in the result reached by the majority in this case, I find that I must take a moment to write separately. For reasons more specifically set out in my dissent in the case of *School Dist. No. 17 and Westside Comm. Schools v. State,* 210 Neb. 762, 316 N.W.2d 767 (1982), I believe that the court's continual reference to the requirement that appeals from an action by a city to the District Court must in some manner follow a section of the statutes applicable to justice of the peace courts, which no longer exist, is unsound. For that reason I concur in the result reached by the majority, but disagree with the need for making the distinction which the majority has made herein.

I am authorized to say that KRIVOSHA, C.J., joins in this concurrence.

STATE OF NEBRASKA EX REL. JODY N. VAN CLEAVE AND KATHY L. VAN CLEAVE, APPELLEES, V. CITY OF NORTH PLATTE, LINCOLN COUNTY, NEBRASKA, APPELLANT.

329 N.W.2d 358

Filed January 28, 1983. No. 81-833.

1. **Mandamus.** A verification which is a part of an affidavit upon which a writ of mandamus is sought must be positively verified, and a verification based upon mere belief is inadequate.
2. _____. An action to procure the issuance of a writ of mandamus is

not begun until a motion and affidavit, or a petition verified positively, is filed in the District Court.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Reversed and remanded with directions to dismiss.

Richard W. Satterfield, for appellant.

Patrick B. Hays of Clough & Hays, for appellees.

Mattson, Ricketts, Davies, Stewart, Calkins & Duxbury, for amicus curiae League of Nebraska Municipalities.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

KRIVOSHA, C.J.

The City of North Platte, Nebraska, appeals from an order entered by the District Court for Lincoln County, Nebraska, directing the issuance of a peremptory writ of mandamus requiring the City of North Platte to connect the appellees' property to a water main owned by the city.

On November 2, 1981, the Van Cleaves filed a document entitled "Petition and Affidavit for Writ of Mandamus" in the District Court for Lincoln County, Nebraska. The petition alleged that the Van Cleaves were the owners of certain real estate located in the City of North Platte abutting a water main previously constructed and now owned by the City of North Platte. The petition further alleged, in essence, that the city refused to make the connection unless the Van Cleaves agreed to pay to the city an amount "equivalent to the average current water main assessment amount on water districts on a front foot or square foot basis as appropriate." The Van Cleaves alleged that they offered to pay the normal hookup fee in the amount of $295 but refused to pay the additional charge, computed to be in the amount of $721.54. The petition concluded by alleging that the Van Cleaves had no adequate remedy

at law, that the right of the Van Cleaves to require the City of North Platte to act as requested was clear, and that it was apparent "that no valid excuse can be given for nonperformance."

Without notice, the trial court issued a peremptory writ of mandamus directing the city to connect the Van Cleaves' property to the city water main adjacent to their property. Thereafter, on November 12, 1981, the city filed a document entitled "Motion to Vacate Judgment," alleging that the "City is willing to allow the plaintiffs to connect to its water main provided that the plaintiffs pay to the City its customary and standard charges as determined by the ordinances of the City." The motion to vacate did not make reference to the ordinances, but at the hearing on the motion to vacate there was offered in evidence, without objection, a copy of ordinance No. 2333. The ordinance provided in part: "That a property owner who has not previously shared in water main costs shall not be entitled to make connection to such existing main until he has paid to the North Platte Water Department the current average equivalent water district assessment cost as determined by the manager of the Municipal Light and Water Department. Nothing herein shall be construed to prevent the city from supplying water by separate agreement." The city maintains that, by reason of the existence of ordinance No. 2333, it is entitled to collect the sums requested and that the peremptory writ should not have been issued. Unfortunately, we are not able to reach that issue and do not, by this opinion, pass upon the validity of the ordinance in question.

The right to a peremptory writ of mandamus is dependent upon statute. See Neb. Rev. Stat. §§ 25-2156 to 25-2169 (Reissue 1979). Specifically, § 25-2160 provides in part: "The motion for the writ must be made upon affidavit." The record in this case fails to disclose the filing of such an affidavit, even though the document filed was so entitled. The

petition and affidavit for writ of mandamus filed by the Van Cleaves is verified as follows: "NOW on this 2nd day of November, 1981, before me, the undersigned Notary Public, personally appeared Jody N. Van Cleave and Kathy L. Van Cleave, who being first duly sworn upon oath, signed the above and foregoing Petition and Affidavit and acknowledged that they have read said Petition and Affidavit, know the contents thereof *and the facts alleged therein are true as they verily believe.*" (Emphasis supplied.) A verification which is a part of an affidavit upon which a writ of mandamus is sought must be positively verified, and a verification based upon mere belief is inadequate. In the case of *State ex rel. Roberts v. The Mayor,* 4 Neb. 260 (1876), we said: "Our statute regulating the issuance of this writ, requires the motion therefor to be made upon an affidavit setting forth the facts upon which it is based. *Genl. Stat.,* 640, *Sec.* 649. This application is by petition, verified in the usual mode of verifying a pleading under the code, that the facts stated therein are true as affiant 'verily believes.' This is a fatal defect, and a sufficient reason for denying the motion." What was Gen. Stat. § 649 (1873) is now that portion of § 25-2160 which requires the filing of an affidavit.

In *The State ex rel. Leonard v. School Dists. No. 3 and 4, Clay Co.,* 8 Neb. 98 (1878), we again addressed this issue, saying: "The application for a mandamus in this case is verified upon information and belief. An application verified in this manner, where there is no appearance on the part of the defendants, is sufficient cause for refusing either a peremptory or alternative writ."

In the case of *Little v. Board of County Commissioners,* 179 Neb. 655, 140 N.W.2d 1 (1966), appellants sought a review of the trial court's dismissal of their petition in error. As a part of their argument, appellants urged the court to consider their filings as a petition and affidavit seeking a writ of mandamus.

In rejecting that argument we said at 660, 140 N.W.2d at 4-5: "Appellants urge that if we determine that a petition in error is not the proper remedy, that the pleadings are broad enough to permit mandamus or other appropriate relief. There are several reasons why appellants' contention is without merit. Suffice it to say that even if the petition in error, *which is verified on information and belief,* is broad enough to be interpreted as a petition in mandamus, there is no application by motion supported by affidavit to justify the action pursuant to section 25-2160, R.R.S. 1943. See State ex rel. Krieger v. Board of Supervisors, 171 Neb. 117, 105 N.W.2d 721.

"As we said in State ex rel. Chicago & N. W. Ry. Co. v. Harrington, 78 Neb. 395, 110 N.W. 1016: 'An action to procure the issuance of a writ of mandamus is not begun until a motion and affidavit, or a petition *verified positively,* is filed in the district court, * * *.' " (Emphasis supplied.) It appearing without question that neither a motion and affidavit nor a petition positively verified has been filed, the trial court was without authority to issue the peremptory writ of mandamus. The reason for such a rule should be apparent. The issuance of a peremptory writ of mandamus is an extraordinary action and should not be done unless the trial court is assured that there is someone who represents to the court that the facts presented are true and who may be subject to perjury if it later proves otherwise. We are not able to reach the issue of whether ordinance No. 2333 is constitutional and valid. The judgment of the trial court therefore is reversed and the cause is remanded with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

Cite as 213 Neb. 431

LEO MASID, APPELLEE, V. FIRST STATE BANK, APPELLANT.

329 N.W.2d 560

Filed January 28, 1983. No. 81-857.

1. **Equity: Appeal and Error.** A case in equity is reviewed in the Nebraska Supreme Court de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, we will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Easements: Proof.** Prescriptive rights are not looked upon with favor and, generally, must be proved by clear, convincing, and satisfactory evidence.
3. **Easements.** The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full prescriptive period.
4. _____. Where adjoining proprietors lay out an alley between their lands, each devoting a part of his land to that way or alley, which is used for the prescriptive period by the respective owners or their successors in title, neither can obstruct or close that part which is on his own land; and in these circumstances the mutual use of the whole of the alleyway is to be considered to be adverse to a separate and exclusive use by either.
5. **Easements: Presumptions.** Where a claimant has shown open, visible, continuous, and unmolested use for the prescriptive period, the use will be presumed to be under a claim of right. The burden then falls upon the owner of the servient estate to rebut that presumption by showing the use to be permissive.
6. **Abandonment: Proof.** Abandonment must be pled and proved, the burden of proof being on the party alleging it.
7. **Easements: Notice.** Possession of land is notice to the world of the possessor's rights therein and of all interests which inquiry of the possessor would have revealed.
8. _____: _____. Where one is put on inquiry, he is charged with notice of all facts as he would have learned by a reasonable inquiry.
9. **Easements: Due Process: Notice.** Due process requires at a minimum that deprivation of property by adjudication be preceded by notice and the opportunity to be heard as is appropriate to the nature of the case.
10. **Easements: Notice.** The whereabouts of a possessor of land are known and as such he is entitled to personal notice of any proceeding which may affect his interest in that land.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Raymond, Olsen, Coll & Ediger, P.C., for appellant.

James R. Hancock of the Hancock Law Offices, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and BRODKEY, J., Retired.

CAPORALE, J.

Defendant-appellant, First State Bank, appeals from the order of the District Court which confirms in plaintiff-appellee, Leo Masid, a prescriptive easement of access over certain of defendant's land, prevents defendant from interfering with the use thereof, and enjoins defendant from maintaining certain structures within the easement. We affirm.

Defendant, in summary, contends the trial court erred in (1) finding plaintiff had proved a prescriptive easement, (2) failing to find a nonuser abandonment of any easement which may have existed, and (3) failing to find that an earlier quiet title decree bound plaintiff.

The matter being equitable in nature, it is reviewed in this court de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, we will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Spilinek v. Spilinek,* 212 Neb. 811, 326 N.W.2d 170 (1982); *Sturm v. Mau,* 209 Neb. 865, 312 N.W.2d 272 (1981).

We find the facts, in accordance with the foregoing rules, as hereinafter set forth. The lot adjacent to the area in question faces east on Broadway Street between 20th and 21st Streets in Scottsbluff, Nebraska. It was purchased by plaintiff's father in 1926 and was acquired by plaintiff in 1955. Broad-

way Street, from 1926 to the present, has been divided by an island which allows ingress and egress to the property from only one direction. A north-south way or alley, approximately 10 feet wide, has existed adjacent to the west edge of plaintiff's lot. Access to this alleyway was by means of a curb cut at its north end on 21st Street. The Masid family lived on the premises from 1926 to 1936 when they moved, during which period they used the alleyway as an additional means of ingress and egress to the premises. For a period of time thereafter the premises were rented to various residential tenants who used the alleyway in the manner used by the Masids. In approximately 1951 the house was removed and the land was rented for use in connection with adjacent property as a car sales lot. This lessee graded the land back to and across the alleyway, placing all of the land at a uniform grade. The alleyway was further used during this time for ingress and egress. Following the car lot operation, the premises were leased by a drive-in establishment which sold gasoline as a part of its operation. During this later period the alleyway continued to be used for ingress and egress. The premises were vacant for a period which may have begun as early as sometime in 1968 to approximately August of 1979 when plaintiff began to construct the commercial office building presently on the premises. This brick block building, which has two rear doors opening onto the alleyway, was essentially built and enclosed by December 13, 1979. Plaintiff occupied this building and used the rear doors through the alleyway beginning in December of 1979. On December 13, 1979, defendant instituted a quiet title action. A decree entered January 15, 1980, quieted title in defendant to the northwest quarter of the block within which the disputed easement and defendant's land are located. Plaintiff was not made a party to the quiet title action; the decree quiets title to nothing other than the literal "northwest fourth" of the block.

The defendant has fenced, paved, and placed an electrical transformer box within the one-half portion of the disputed alleyway adjacent to its property. The fence and transformer box make it impossible for plaintiff to use the one-half portion of the disputed alleyway adjacent to his property as he had in the past.

Prescriptive rights are not looked upon with favor and, generally, must be proved by clear, convincing, and satisfactory evidence. *Hengen v. Hengen,* 211 Neb. 276, 318 N.W.2d 269 (1982); *Sturm v. Mau, supra; Svoboda v. Johnson,* 204 Neb. 57, 281 N.W.2d 892 (1979). The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full prescriptive period. Neb. Rev. Stat. § 25-202 (Reissue 1979); *Svoboda v. Johnson, supra; Fischer v. Grinsbergs,* 198 Neb. 329, 252 N.W.2d 619 (1977); *Jurgensen v. Ainscow,* 155 Neb. 701, 53 N.W.2d 196 (1952). While some of our earlier opinions have included a requirement that the use also be with "the knowledge and acquiescence of the owner of the servient tenement," upon further reflection we now determine that such a requirement is neither necessary nor proper and is now specifically deleted as a requirement for establishing a prescriptive easement.

Our holding in *Fischer v. Grinsbergs, supra,* is largely dispositive of defendant's first assignment of error. We held therein that where adjoining proprietors lay out an alley between their lands, each devoting a part of his land to that way or alley, which is used for the prescriptive period by the respective owners or their successors in title, neither can obstruct or close that part which is on his own land; and in these circumstances the mutual use of the whole of the alleyway is to be considered to be

adverse to a separate and exclusive use by either. No evidence was adduced to the effect that the way at issue was a public alley dedicated in the customary fashion as such; therefore, the rule in *Fischer* applies to this case. We also said in *Fischer* that where a claimant has shown open, visible, continuous, and unmolested use for the prescriptive period, the use will be presumed to be under a claim of right. The burden then falls upon the owner of the servient estate to rebut that presumption by showing the use to be permissive. That presumption was not rebutted by the evidence in this case. We conclude, therefore, that the evidence clearly, convincingly, and satisfactorily establishes an exclusive use which was under a claim of right, continuous and uninterrupted, open and notorious, for the full prescriptive period. The trial court was therefore correct in determining that an easement by prescription came into existence.

The question now becomes whether that easement was abandoned. Abandonment must be pled and proved, the burden of proof being on the party alleging it. *Agnew v. City of Pawnee City,* 79 Neb. 603, 113 N.W. 236 (1907). Defendant did not plead abandonment, nor does the evidence establish it. It is true the evidence is that the land to which the easement is appurtenant was vacant for a period of 11 or 12 years. However, this circumstance, in and of itself, does not establish abandonment. Nonuser for a period sufficient to create an easement by prescription will raise a presumption to defeat the right, but this nonuser is open to explanation and may be rebutted by proof that the owner had no intention to abandon his easement while thus omitting to use it. An intention to abandon an easement cannot be inferred from the mere fact that the premises to which it is appurtenant were vacant for a period of years in excess of the prescriptive period. *Agnew v. City of Pawnee City, supra.* Unlike *Toelle v. Preuss,* 172 Neb. 239, 109 N.W.2d 293 (1961), the

plaintiff herein did not by his own act render the use of the easement impossible, nor did he obstruct it in a manner inconsistent with its further enjoyment. There is no abandonment in this case, even if defendant were to have pled it.

There remains, then, the question of whether the quiet title decree obtained by the defendant is binding upon the plaintiff. The plaintiff was in possession of the land to which the easement was appurtenant, at least by the time the defendant commenced its quiet title action and certainly during its prosecution. Possession of land is notice to the world of the possessor's rights therein and of all interests which inquiry of the possessor would have revealed. *Durfee v. Keiffer,* 168 Neb. 272, 95 N.W.2d 618 (1959); *Blum v. Poppenhagen,* 142 Neb. 5, 5 N.W.2d 99 (1942). Defendant's argument that though plaintiff was in possession of his land he was not in possession of the easement is imaginative, creative, and without substance. Where one is put on inquiry, he is charged with notice of all facts as he would have learned by a reasonable inquiry. *Swanson Petroleum Corp. v. Cumberland,* 184 Neb. 323, 167 N.W.2d 391 (1969). Due process requires at a minimum that deprivation of property by adjudication be preceded by notice and the opportunity to be heard as is appropriate to the nature of the case. The whereabouts of a possessor of land are known and as such he is entitled to personal notice of any proceeding which may affect his interest in that land. See, *Greene v. Lindsey,* 456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982); *Mullane v. Central Hanover Tr. Co.,* 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). See, also, *Estate of Colman v. Redford,* 179 Neb. 270, 137 N.W.2d 822 (1965); *School Dist. No. 8 v. State Board of Education,* 176 Neb. 722, 127 N.W.2d 458 (1964). The trial court was entirely correct in holding that defendant's quiet title decree did not bind plaintiff.

None of defendant's assignments of error having

merit, the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS SELL, APPELLANT.

329 N.W.2d 361

Filed January 28, 1983. Nos. 82-303, 82-304, 82-305.

1. **Mentally Disordered Sex Offender: Appeal and Error.** This court will not disturb the District Court finding that an individual is a mentally disordered sex offender presently untreatable unless it can be said that there was no evidence upon which such conclusions could be based and that such declaration was an abuse of discretion.
2. **Physicians and Surgeons: Licenses.** Under the provisions of Neb. Rev. Stat. § 29-2913 (Reissue 1979), an evaluating physician must be licensed to practice medicine in the State of Nebraska.

Appeal from the District Court for Dawson County: KEITH WINDRUM, Judge. Affirmed.

John P. Murphy of Ruff & Murphy, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

KRIVOSHA, C.J.

The appellant, Dennis Sell, appeals from an order entered by the District Court for Dawson County, Nebraska, finding Sell to be an untreatable mentally disordered sex offender. On review, we affirm.

This matter was originally before us and is reported in the case of *State v. Sell,* 202 Neb. 840, 277 N.W.2d 256 (1979). The facts of the case are sufficiently set out therein and need not be repeated here. Suffice it to say that Sell was previously determined by the trial court to be an untreatable sexual sociopath, pursuant to the Nebraska sexual

sociopath law, and ordered held in the Nebraska Penal and Correctional Complex. Following that determination, the Nebraska Legislature repealed the sexual sociopath law and replaced it with the provisions of Neb. Rev. Stat. §§ 29-2911 to 29-2921 (Reissue 1979). See 1979 Neb. Laws, L.B. 378. The newly enacted provisions provide that after a person is convicted of a felony sexual offense the court shall order a presentence investigation, which shall include an evaluation to determine whether the defendant is a mentally disordered sex offender. See § 29-2912. Pursuant to the provisions of the mentally disordered sex offender law, the District Court appointed a panel of two physicians licensed to practice medicine and surgery and who have had at least 3 years of special training in treatment of mental disorders. See § 29-2913. Following an examination of Sell, the doctors appointed by the court filed their report, finding Sell to be a nontreatable mentally disordered sex offender. Sell disagreed with the conclusions of the court-appointed panel and, pursuant to § 29-2913, filed a motion requesting that the court appoint two physicians of his choice to complete an evaluation. On February 26, 1982, the court granted the motion of appellant and ordered him to be evaluated by Dr. Robert E. Mitchell of Omaha, Nebraska, and Dr. Berten Mann of Omaha, Nebraska. Dr. Beverley T. Mead of Omaha, Nebraska, was later substituted for Dr. Mann. After the evaluations were completed a hearing was held on March 31, 1982, at which time Sell was present. The court determined that Sell was a mentally disordered sex offender who was presently untreatable and therefore should remain confined at the Nebraska Penal and Correctional Complex.

Sell has assigned two errors. First, Sell maintains that the District Court erred in determining that he was an untreatable mentally disordered sex offender. Also, Sell maintains that the court erred

in refusing to permit him to select a physician of his choice for his evaluation.

The record simply does not support the claim that the court erred in determining that Sell is an untreatable mentally disordered sex offender. All four of the physicians concluded that Sell was an untreatable mentally disordered sex offender. Dr. John D. Baldwin, one of the psychiatrists appointed by the court, stated that Sell "is a mentally disordered sex offender and that this condition is not legally treatable in the State of Nebraska." Dr. Baldwin compared Sell to a "bomb ready to go off." Dr. Robert G. Osborne, the other psychiatrist appointed by the court, likewise concluded that "Sell is a mentally disordered sex offender, and further, that his condition is not treatable." Dr. Osborne concluded his report by observing that "This is obviously a man who has a lifelong pattern of increasingly deviant and dangerous behavior, and though it is true that personality disorders tend to 'burn out' as a person ages, I think it would be foolhardy to consider that he will 'burn out' in the next two or three decades." The physicians appointed at Sell's request also reached the same conclusion. Dr. Mitchell diagnosed Sell as a sexual sadist with an antisocial personality disorder. After noting that Sell's sexual arousal was enhanced by the resistance of his victim, Dr. Mitchell felt that it was "more likely in his case that not only would he commit rape but also be inclined to brutality and serious physical injury." It was Dr. Mitchell's opinion "that this individual does meet the criteria for mentally-disordered sex offender" but was not treatable at this time. Likewise, Dr. Mead, after examining Sell, reached the conclusion that Sell should "still be regarded as untreatable." In our earlier *Sell* case, *supra,* we held that this court will not disturb a District Court finding that an individual is a mentally disordered sex offender presently untreatable unless it can be said that there was no evidence upon which such conclu-

sions could be based and that such declaration was an abuse of discretion. The present record not only provides some evidence from which the trial court could conclude as it did but presents evidence from which no other conclusion could be reached. There is simply no merit in Sell's claim that the trial court erred in determining that he was an untreatable mentally disordered sex offender.

His second claim of error must also be overruled. Though there appears no motion in the record concerning a request by Sell for physicians other than Drs. Mitchell and Mann, later replaced by Dr. Mead, there is a brief discussion between counsel and the trial court found in the bill of exceptions. "MR. MURPHY: We have no evidence, Your Honor, just argument. THE COURT: All right. Argument? MR. MURPHY: Excuse me, Your Honor, there is a motion, or actually something I would like to place on the record. THE COURT: All right. MR. MURPHY: At the time that we requested the Court for further evaluation of Mr. Sell, one of the physicians, licensed physicians, that we wished to have Mr. Sell evaluated by, was by a Dr. Franks. The Court, at that time, advised that the Court read the statute to mean that the physician was to be licensed within the State of Nebraska. We'd simply like to show on the record that we did request that Dr. Franks be one of the physicians, but that request was denied by the Court. THE COURT: The record will so show. The Court determined that the defendant has the choice of psychiatrists, but the Court ruled they had to be licensed in Nebraska. MR. MURPHY: That's all I'd have, then." The narrow question, then, is whether the trial court was correct in concluding that § 29-2913 was to be read so as to mean that the physician selected by either the court or the defendant must be licensed to practice in the State of Nebraska. We believe that a reading of both the mentally disordered sex offender law and the laws of Nebraska

generally with regard to the practice of medicine support the trial court's position. Neb. Rev. Stat. § 71-1,103 (Reissue 1981) provides who may engage in the practice of medicine in the State of Nebraska. The section reads in part: "Every act or practice falling within the practice of medicine and surgery as defined not specially excepted herein, shall constitute the practice of medicine and surgery *and may be performed in this state only by those licensed by law to practice medicine in Nebraska.*" (Emphasis supplied.)

Under the provisions of § 71-1,103, unless an individual falls within a specific exception, the individual may not engage in the practice of medicine in this state unless he or she is licensed by law within this state. If one came into the state from outside Nebraska and attempted to conduct an individual psychiatric examination of the defendant, he would be in violation of § 71-1,103. We cannot believe that the Legislature intended to authorize a physician to conduct a psychiatric examination pursuant to § 29-2913 in violation of § 71-1,103. Had the Legislature intended to permit physicians not licensed to practice medicine and surgery in Nebraska to be so appointed, it would have been unnecessary to include the phrase "licensed to practice medicine and surgery." Simply describing them as physicians who had at least 3 years of special training in treatment of mental disorders would have been sufficient. In view of the language of § 71-1,103 and the exceptions thereto, we must conclude that the Legislature, in § 29-2913, intended "licensed to practice medicine and surgery" to mean licensed in the State of Nebraska. We therefore conclude that the determination by the trial court regarding the appointment of Dr. Franks was correct. There appearing no error in the record, the judgment of the trial court is affirmed.

AFFIRMED.

KERREY'S, INC., A NEBRASKA CORPORATION, APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT.

329 N.W.2d 364

Filed January 28, 1983. No. 82-636.

1. **Liquor Licenses.** The failure of a local governing body to approve an application for a liquor license does not necessarily constitute a recommendation of denial and, standing alone, is insufficient evidence to support a denial of the application by the Nebraska Liquor Control Commission.
2. **Administrative Hearings: Liquor Licenses.** At a hearing on an application for a liquor license, the burden is upon the applicant to prove its fitness and willingness to provide the service proposed, its ability to conform to the rules of the Nebraska Liquor Control Act, that its management and control exercised over the premises will insure compliance with such rules and regulations, and that the issuance of the license is or will be required by the present or future public convenience and necessity. Although the Liquor Control Commission may consider the recommendation of the local governing body in determining whether or not to issue such license, the burden is not on the applicant to provide evidence of such recommendation.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellant.

Robert F. Peterson of Lydick & Peterson, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ.

HASTINGS, J.

The Nebraska Liquor Control Commission denied the application of Kerrey's, Inc., for a class C liquor license. On appeal to the District Court, the commission's order of March 25, 1982, was reversed and it was directed to issue the license. The commission has appealed to this court, assigning as error the allocation of the burden of proof by the District Court and the absence of competent evidence to support its order.

The only protest filed as to the plaintiff's application for the 2510 South 132d Street, Omaha, Nebraska, location was a perfunctory jurisdictional one entered by the commission's executive director. The notice of hearing before the commission stated the issues to be decided as: (1) The effect of the absence of a recommendation from the local governing body, and (2) Whether the applicant could demonstrate that the issuance of the license is required by the present or future public convenience and necessity, as provided for in Neb. Rev. Stat. § 53-132 (Cum. Supp. 1982).

Taking up the second issue first, we need mention only two things. First, there was substantial evidence presented by the plaintiff at the hearing before the commission in support of the public convenience and necessity question and no evidence whatsoever in opposition thereto or to the granting of the application. Second, in support of its findings that the application should be denied, the commission mentioned only that the local governing body "was not in favor of the issuance of this license and had as a matter of fact voted to recommend denial." Therefore, it seems quite apparent from the record that, for the purpose of this appeal, we may assume that the applicant has sustained its burden of proving public convenience and necessity.

An examination of the record discloses that the findings of the commission just mentioned are not fully supported by it. There was no formal filing by the city of Omaha with the commission of any document or information touching upon this application. The only reference to any action of the Omaha City Council is contained in the testimony of the sole witness at the hearing, the secretary-treasurer of Kerrey's, Inc. After establishing that he was present at the council meeting at which this particular matter was discussed, the following questions and answers between counsel and the witness occurred: "Q And at the time you were there, what decision did they

render? A They rendered, to my understanding, based on the Omaha City Ordinance, that they could not approve the issuance of a new license. . . . Q It was your understanding, then, that it was only the ordinance that caused them to not be able to make a favorable recommendation. A Yes."

Read in a literal sense, the most that can be said about the action of the Omaha City Council is that it refused to approve the application or that it was not able to make a favorable recommendation. In *Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission,* 203 Neb. 176, 181, 277 N.W.2d 693, 696 (1979), we said: "In this case, a resolution recommending approval failed to receive a majority vote; it was clearly ineffective to constitute any official action of the governing body; amounted to no recommendation at all; and does not furnish competent evidence upon which to base a denial of a liquor license application by the Commission."

Beyond that, we believe that it is not too much to ask that a local governing body, if it is actually interested in the denial of a license application, furnish the commission with some evidence of official action on its part. "The vote here was clearly ineffective to constitute any *official* action of the governing body." (Emphasis supplied.) *Hadlock v. Nebraska Liquor Control Commission,* 193 Neb. 721, 727, 228 N.W.2d 887, 891 (1975).

It is true, as stated by the commission, that a recommendation of a local governing body that a license should be *denied,* standing alone, provides sufficient evidentiary basis on which the commission might deny an application for a liquor license. *72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission,* 199 Neb. 729, 261 N.W.2d 614 (1978). However, the statement in *Hadlock, supra* at 728, 228 N.W.2d 891-92 is more apropos of this situation: "Here the Nebraska Liquor Control Commission found that the local governing body had recommended denial of the application, and it based its

own decision on that assumed fact. If true, that fact would have constituted valid grounds for denial of the application. However, there is no evidence to support that finding, nor is there any other evidence in the record which could have constituted valid grounds for denial. To the contrary, the evidence established that the purported recommendation of denial by the city counsel [sic] was wholly ineffective to constitute official action by the city. At best it could only be treated as a failure to act. Under such circumstances, the order of denial was arbitrary and unreasonable."

We agree that the burden is on the applicant for a liquor license to prove its fitness and willingness to provide the service proposed, its ability to conform to the rules and regulations of the Nebraska Liquor Control Act, that the management and control exercised over the premises will insure compliance with such rules and regulations, and that the issuance of the license is or will be required by the present or future public convenience and necessity, as provided for in § 53-132(2). However, such burden does not necessarily include that of obtaining the approval or recommendation of the local governing body. As demonstrated by the cited case authorities, and § 53-132(3), such evidence may be considered by the commission in making its determination as to whether or not the license application should be approved, and evidence of a recommended denial *may* be sufficient to justify its own denial. In the absence of a statutory requirement to that effect, we will not impose such burden on the applicant by judicial fiat.

The judgment of the District court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL L. SMITH, APPELLANT.

329 N.W.2d 564

Filed February 4, 1983. No. 81-672.

1. **Prior Convictions: Proof.** In a proceeding to enhance the punishment because of prior convictions, the burden remains on the State to prove such convictions.
2. **Judgments: Prior Convictions: Proof.** A judgment of conviction which would have been invalid to support a sentence of imprisonment in the first instance is not valid to enhance the punishment in a subsequent case.
3. **Prior Convictions: Right to Counsel: Proof.** That defendant's right to counsel was honored in a prior conviction may not be proved by a silent record.
4. **Prior Convictions: Collateral Attack: Case Overruled.** At an enhancement proceeding, a defendant's objection to the reception in evidence of a transcript of a former conviction which fails to show on its face that counsel was afforded or the right waived does not constitute a collateral attack on such prior conviction. To the extent that *State v. Orosco,* 199 Neb. 532, 260 N.W.2d 303 (1977), and *State v. Voight,* 206 Neb. 829, 295 N.W.2d 112 (1980), conflict with this holding, they are overruled.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Reversed and remanded for further proceedings.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

HASTINGS, J.

The defendant, Paul L. Smith, was found guilty by the District Court of third offense driving while intoxicated, a violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1978), and sentenced accordingly. He has appealed to this court and assigns as error the reception into evidence, for enhancement purposes, of certified copies of two prior driving-while-intoxicated convictions. These transcripts of judgment failed to

disclose whether, at the time of such convictions, the defendant was either represented by counsel or had waived the right to counsel.

There is no question concerning the basic conviction which resulted from a jury trial. However, at the hearing to determine whether or not the conviction was a third offense, the only things offered in evidence were two Omaha Municipal Court form transcripts of judgment which indicated the defendant had pleaded nolo contendere in each instance and upon "trial" was found guilty. One offense was in 1972 and the other in 1973. As we have stated above, nothing appears on either transcript to show if the defendant was represented by counsel or if he had waived such representation.

In *State v. Tweedy,* 209 Neb. 649, 654-55, 309 N.W.2d 94, 98 (1981), we said: "[N]o defendant may be imprisoned for any offense . . . absent a knowing and intelligent waiver of his rights . . . . That means that such defendants are entitled to be informed of the nature of the charges against them, the *right to assistance of counsel* . . . . A voluntary and intelligent waiver of these rights must *affirmatively appear from the record.*" (Emphasis supplied.)

By per curiam opinion in *Baldasar v. Illinois,* 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980), the Supreme Court held that an uncounseled misdemeanor conviction may not be used to enhance the penalty and convert a subsequent misdemeanor into a felony with a prison term. The concurring opinion of Mr. Justice Marshall perhaps best explains the rationale of the Court. " '[I]ncarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense,' [citation omitted].

"That petitioner has been deprived of his liberty 'as a result of [the first] criminal trial' could not be clearer. If it had not been for the prior conviction, petitioner could not have been sentenced to more

than one year for the present offense. . . .

". . . It [the subsequent sentence] was imposed as a direct consequence of that uncounseled conviction and is therefore forbidden under *Scott* and *Argersinger*.

"We should not lose sight of the underlying rationale of *Argersinger,* that unless an accused has 'the guiding hand of counsel at every step in the proceedings against him,' [citation omitted] his conviction is not sufficiently reliable to support the severe sanction of imprisonment. [Citation omitted.] An uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent offense. For this reason, a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." *Id.* at 226-28.

We recognize that in *State v. Voight,* 206 Neb. 829, 295 N.W.2d 112 (1980), we held that in a proceeding to show a prior conviction for the purpose of enhancing the penalty in a subsequent conviction, where proof has been made of the defendant's prior conviction, the defendant cannot then collaterally attack that earlier conviction. However, such holding seems to run squarely contrary to the rule laid down in *Baldasar.*

Additionally, we said in *State v. Orosco,* 199 Neb. 532, 260 N.W.2d 303 (1977), that when a defendant collaterally attacks a judgment of conviction the burden is upon him to show the grounds of the claimed invalidity *if it does not show upon the face of the record.* However, in *Burgett v. Texas,* 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), the Supreme Court was faced with a situation similar to that of the case here. In a Texas prosecution an attempt was made to utilize a prior Tennessee conviction, the transcript of which failed to show whether the defendant had been represented by counsel or

whether counsel had been waived. The Court said: "In this case the certified records of the Tennessee conviction on their face raise a presumption that petitioner was denied his right to counsel in the Tennessee proceeding, and therefore that his conviction was void. Presuming waiver of counsel from a silent record is impermissible. [Citation omitted.] To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case." *Id.* at 114-15.

In *Voight* and *Orosco* our choice of words was unfortunate. We agree that in an enhancement proceeding, a defendant should not be able to relitigate the former conviction, and to that extent such conviction cannot be collaterally attacked. However, under the present circumstances, the burden remains with the State to prove the prior convictions. This cannot be done by proving a judgment which would have been invalid to support a sentence of imprisonment in the first instance. *Baldasar v. Illinois, supra.* Where a record is silent as to a defendant's opportunity for counsel, we may not presume that such rights were respected. *Burgett v. Texas, supra; State v. Tweedy, supra.* A defendant's objection to the introduction of a transcript of conviction which fails to show on its face that counsel was afforded or the right waived does not constitute a collateral attack on the former judgment. The objection should have been sustained. To the extent that *Voight* and *Orosco* conflict with this holding, they are overruled.

The judgment of the District Court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ROBERT J. EASLEY AND KATHRYN L. EASLEY, VALE O. VAN BOSKIRK, ST. THOMAS AQUINAS CHURCH, A CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE.

330 N.W.2d 130

Filed February 4, 1983. No. 81-718.

1. **Public Property: Taxation.** Ordinarily, public property is exempt from general purpose taxation.
2. **Taxation: Political Subdivisions: Special Assessments.** A distinction is recognized between taxation for general purposes and the levying of assessments on specific property for specific benefits conferred upon it by means of an improvement district created by an appropriate governing authority.
3. **Constitutional Law: Political Subdivisions: Special Assessments.** There is no constitutional prohibition against the assessment of a governmental subdivision for special benefits conferred upon its realty as the result of improvements created by an appropriate governing authority.
4. **Leases.** Bare lessees cannot be said to represent fee simple ownership, no matter how long the term of the lease.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded with directions.

William F. Austin, City Attorney, for appellant.

Michael O. Johanns and John F. Akin, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

This appeal from a collateral attack upon the creating ordinance seeks to reverse the judgment of the trial court in these three consolidated cases which invalidated Business Improvement District No. 1 of the City of Lincoln. We reverse.

Appellant, City of Lincoln, contends the trial court improperly determined that the properties owned by the Board of Regents of the University of Nebraska,

the City of Lincoln, and the County of Lancaster should be excluded from the computation of the assessable front footage; improperly found that protests filed by purchasers under unrecorded land contracts were valid within the meaning of the statute, Neb. Rev. Stat. § 19-4009 (Reissue 1977); and improperly found that protests filed by certain corporate and individual agents signing without a showing of authority were valid. Further, appellees, Robert J. Easley et al., contend in their cross-appeal that the trial court erred in finding protests filed by lessees of certain properties to be invalid.

Pursuant to the provisions of the former Business Improvement District Act, Neb. Rev. Stat. §§ 19-4001 et seq. (Reissue 1977), the City of Lincoln created the district at issue for the purpose of constructing, maintaining, repairing, replacing, and reconstructing certain amenities within designated public rights-of-way in its downtown business area. Section 19-4009 provided then, as does present day Neb. Rev. Stat. § 19-4027 (Cum. Supp. 1982), in pertinent part: "Proceedings for any proposed district shall terminate if protest is made by the owners of over fifty per cent of the assessable front footage in the proposed district."

The parties stipulated that there was a total of 22,571.83 front feet in the district at issue. They agreed that the 900 front feet belonging to the General Services Administration of the federal government should be excluded from the computation of the assessable front footage. That, therefore, leaves a total of 21,671.83 front feet potentially subject to assessment.

The Board of Regents of the University of Nebraska owns 1,047 front feet, the City of Lincoln owns 300 front feet, and the County of Lancaster owns 142 front feet. The question is whether any part of these 1,489 publicly owned front feet should be excluded from the computation of the assessable front footage.

It is axiomatic that, ordinarily, public property is exempt from general purpose taxation. Neb. Const. art. VIII, § 2. However, to say that public property is exempt from taxation is not to say that it is exempt from liability accruing for special assessments levied by reason of special benefits conferred upon the property. A distinction is recognized between taxation for general purposes and the levying of assessments on specific property for specific benefits conferred upon it by means of an improvement district created by an appropriate governing authority. There is, as noted in *Von Steen v. City of Beatrice,* 36 Neb. 421, 54 N.W. 677 (1893), a conflict among the states of our nation concerning the recognition of this distinction. In Nebraska that distinction between the two has been and is recognized. This state does not allow public lands benefited by local improvements to obtain a free ride at the expense of other taxpayers in the improved area. In the case of *City of Beatrice v. Brethren Church of Beatrice,* 41 Neb. 358, 366-67, 59 N.W. 932, 934 (1894), we said: "This court has, therefore, recognized a distinction between taxation for general purposes and assessments on account of special benefits conferred to adjacent property. If no such difference in fact existed, the provisions of section 1, article 9, of our constitution would absolutely prohibit the assessment of lots on account of benefits conferred by public improvements adjacent thereto, for, except as his property is specially benefited, the adjacent lot owner has no more concern with such improvements than has anyone else of the general public. He can only use the improved highway in the same way and for the same purposes as may any other individual. On him would be inflicted the same punishment for obstructions placed thereon as would be visited upon an utter stranger in the city for the same offense, notwithstanding the fact that with his own private means alone this portion of the highway had been rendered fit for the use of the general public. If the

special benefit to his adjacent property presents no ground for its special assessment, it is difficult to see how the legislature has provided for necessary revenue by levying a tax by valuation so that (as required by section 1, article 9, of the constitution) each person shall pay a tax in proportion to the value of his property. The exemptions provided by section 2, article 9, of our constitution have reference solely to the general tax by valuation provided in the immediately preceding section, and have no application whatever to the special assessment or special taxation of property benefited by local improvements as contemplated by section 6 of the same article." Earlier in the same opinion we said at 365, 59 N.W. at 934, quoting *Hanscom v. City of Omaha,* 11 Neb. 37, 7 N.W. 739 (1881): " 'The principle which underlies special assessments is that the value of the property is enhanced to an amount at least equal to the assessment. This principle cannot be departed from without taking private property for public use.' " This comports with basic common sense, since public lands may not necessarily always remain in the hands of the public. A specific parcel may be owned by and used by the public for public purposes for a number of years, receiving the benefit of many special improvements during that time. If the public later sells that parcel, and has not been made to pay for those special improvements during that time, then it has effectively received a free ride at the expense of the other assessed property owners within that improvement area when it (the public) is able to receive a higher price for that parcel at the time it is sold, and only by virtue of the special improvements. In *Brethren Church* we also distinguished *Von Steen, supra,* noting that "*Von Steen v. City of Beatrice* . . . was considered solely with reference to chapter 14, Session Laws of 1887 . . . .

"[N]o reference was made to the provisions of our constitution, and . . . it is easy to believe that the

Von Steen case was presented, and perhaps considered, without special reference to the constitution." *Id.* at 361-63, 59 N.W. at 932-33.

In the case of *Farnham v. City of Lincoln,* 75 Neb. 502, 508, 106 N.W. 666, 668 (1906), we said: "[T]his court, in *City of Beatrice v. Brethren Church* . . . has followed the weight of authority on this question. It was there said:

" 'The consensus of these authorities is that an assessment to reimburse a municipal corporation for such benefit as it has conferred upon an adjacent lot by reason of pavements or sidewalks laid alongside it is not an exercise of power to tax in the generally accepted meaning of that term.'

"It is apparent on the face of the constitution that the framers of that instrument did not use the word taxes and the term special assessments as equivalents of each other, or that either included the other. Section 1, article IX, provides that taxes shall be levied by valuation and proportionate value, except special taxes on the kinds of business therein enumerated. Section 6 of the same article provides that the ordinary revenues of municipalities shall be uniform in respect to persons and property, and contains a special provision that the legislature may authorize corporate authorities of towns and villages to make local improvements by special assessments. Construing these provisions in the case last above recited, we said:

" 'The exemptions provided by section 2, article IX of the constitution, are solely with reference to taxes assessed by valuation for general purposes, and have no applicability to special assessments, or special taxation of property benefited by local improvements under authority of section 6 of the same article.'

"This distinction was again recognized in *Scott v. Society of Russian Israelites* . . . ."

In *Drainage District No. 1 v. Richardson County,* 86 Neb. 355, 125 N.W. 796 (1910), the distinction be-

tween public property exemption from general purpose taxation and nonexemption from special assessment liability was further solidified and the adherence of this jurisdiction thereto was again reiterated. Barnes, J., writing for the court, said that the statute which authorized a governmental unit to assess for benefits conferred as against a highway within the district did not conflict with the constitutional exemption concerning general taxation, nor did it conflict with any rule of law which would otherwise proscribe a state from allowing one of its governmental units to assess another of its governmental units on a special assessment basis. Further, the court said at 357-58, 125 N.W. at 798: "Appellant attacks the power of the drainage district to assess and collect from any political subdivision of the state any sum of money for benefits accruing to a highway from the improvement in question, and contends that such power cannot be granted by the legislature. In support of this contention appellant cites section 2, art. IX of the Constitution, exempting the property of the state, counties and municipal corporations from taxation. The theory of that provision is that all such property belongs to the state, and it would be an idle proceeding for the state to collect a tax levied and assessed upon its own property. It has long been settled in this state that this section has reference only to taxes assessed by a general valuation for general purposes, and has no reference to special taxation of property benefited by the creation of local improvements. *City of Beatrice v. Brethren Church.* . . ." Also of interest is the case of *State v. Cheyenne County,* 127 Neb. 619, 621, 256 N.W. 67, 69 (1934), which said: "In this state we are more specifically committed to the view that 'the taxing power vested in the legislature is without limit, except such as may be prescribed by the Constitution itself.' . . .

"And the proper construction of these constitutional limitations necessarily requires the due appli-

cation of the principle that limitations or restrictions upon the exercise of this essential power of sovereignty can never be raised by implication, but the intention to impose them must be expressed in clear, unambiguous language." This language would further seem to indicate that any prohibition on one governmental unit assessing another in the context of the special benefits conferred situation would have to be express in nature; it could not arise merely by virtue of the otherwise seemingly logical argument that there is no point in one governmental unit paying funds to another, the theory generally used in those jurisdictions which do not recognize the distinction between a general purpose taxation exemption and a special benefit conferred liability.

Also relevant are two other cases which have strong implicative value to support the analysis that property otherwise tax exempt is not to be given a "free ride" with respect to special assessments merely because such property has been, during its period of public ownership, exempted from general purpose taxation. The case of *Lennox v. Housing Authority of City of Omaha,* 137 Neb. 582, 290 N.W. 451 (1940), dealt with a statute creating the housing authority which specifically exempted its bonds and property from taxation and also from special assessments. There would have been no purpose in exempting the bonds and property from special assessments had the general exemption from taxation by itself contained such a meaning.

Scott v. Society of Russian Israelites, 59 Neb. 571, 81 N.W. 624 (1900), dealt with church property. The then chief justice, writing for the court, said that property or premises used exclusively for religious purposes (and therefore ordinarily exempt from taxation) "were not exempt from any special assessment that might be legally levied by the city of Omaha." *Id.* at 575, 81 N.W. at 625. Authority for this rule was found in *City of Beatrice v. Brethren Church of Beatrice,* 41 Neb. 358, 59 N.W. 932 (1894).

If church property constitutionally exempted from general purpose taxation is liable for special assessments, why should not other types of property specifically exempted from general purpose taxation nonetheless be liable for special assessments?

We therefore conclude from the foregoing case law that there is no constitutional prohibition against the assessment of a governmental subdivision for special benefits conferred upon its realty as the result of improvements created by an appropriate governing authority. Indeed, as we said in *Brethren Church, supra,* quoting *Hanscom v. City of Omaha,* 11 Neb. 37, 7 N.W. 739 (1881), such a principle must be adhered to or else it will constitute a taking of private property for public use.

The remaining authority cited to us is not pertinent and is distinguishable either in fact or by the presence of a statute requiring a different result.

In *Herman v. City of Omaha,* 75 Neb. 489, 106 N.W. 593 (1906), the court held that city property was not taxable and therefore could not be included in determining the sufficiency of petitions seeking street improvements. However, it should be noted that the opinion stated the exemption of public property from general purpose taxation did not apply in the case. The opinion then proceeded to analyze the question in terms of the provisions of the Omaha city charter and characterized the assessment at issue as a tax, rather than as a special assessment. The only rule emanating from *Herman*, therefore, is that a city cannot "tax" itself for improvements within its corporate boundaries and cannot petition itself for such improvements. However, as seen in *Brethren Church, supra, Farnham v. City of Lincoln,* 75 Neb. 502, 106 N.W. 666 (1906), and *Drainage District No. 1 v. Richardson County,* 86 Neb. 355, 125 N.W. 796 (1910), a special assessment to compensate for special benefits conferred is not a tax. The *Herman* holding is thus not properly apposite here. It is true, however, that *State v. Several Parcels of Land,*

79 Neb. 638, 113 N.W. 248 (1907), a foreclosure action, relying upon *Herman*, stated a public park belonging to the city of Omaha could not be assessed for special benefits conferred by the establishment of a boulevard adjacent thereto. It appears that *Several Parcels* simply does not, in that respect, comport with the general posture of our other cases.

Cuming County v. Bancroft Drainage District, 90 Neb. 81, 132 N.W. 927 (1911), implied authority for the drainage district to apportion to highways within the district their proportionate share of the cost of drainage on the basis that the statute in question authorized the public owner of the highway to vote at the election creating the district. *Cuming County* thus offers nothing which is in conflict with the general rule found in the cases discussed above.

Fontenelle Forest Ass'n v. Sarpy County, 118 Neb. 725, 226 N.W. 327 (1929), does appear to hold that, absent unmistakable inclusion in the tax laws, this state may not tax its own property; but the opinion is of questionable applicability to this case. The authority relevant to the issue before us which was cited in that opinion refers to exemptions from general taxation and not to the issue of special assessment liability. Further, it is not clear whether the issue decided in that case concerned special assessment liability or exemption from general taxation.

Finally, in *Drainage District No. 1 v. Village of Hershey,* 145 Neb. 138, 15 N.W.2d 337 (1944), we again recognized the general purpose taxation exemption versus the special assessment for special benefit distinction, and again adhered thereto in the context of upholding the constitutionality of an act which enabled the drainage authority to assess a village for benefits conferred to streets and alleys within the district.

It seems clear from the foregoing discussion and analysis of our prior cases that there is no rule or custom in this jurisdiction which prevents one governmental unit, in this case the City of Lincoln

through its Business Improvement District No. 1, from assessing other governmental units, herein the Board of Regents of the University of Nebraska, the municipal corporation constituting the City of Lincoln itself, and the County of Lancaster of the State of Nebraska, for those special benefits conferred upon their respective parcels of land by the subject district. The trial court therefore erred when it excluded the front footage owned by these three governmental units from the computation of the assessable front footage.

In view of the foregoing determination, in order to prevail in this appeal the appellees must establish that the owners of more than 10,835.915 assessable front feet, one-half of the total of 21,671.83, made protest. The parties have stipulated that the owners of 9,374.41 front feet validly protested. The City of Lincoln conceded in its brief in this court that the owner of an additional 232 assessable front feet also validly protested. Therefore, the owners of at least 9,606.41 assessable front feet have validly protested.

The appellees claim that an additional 1,903 front feet have validly protested. From that figure must be subtracted the 232 feet which the City of Lincoln now concedes validly protested, which footage is included in the 9,606.41 front feet upon which the parties now agree. Thus, the validity of 1,671 front feet of protests remains disputed. Of these, 444 feet are accounted for in protests filed by the lessees of certain parcels of land.

Appellees urge that lessees should be treated as "owners" for purposes of protesting under § 19-4009. Appellees further argue that *Chan v. City of South Omaha,* 85 Neb. 434, 123 N.W. 464 (1909), dictates this result. However, this is not so. In that case we held that an executor or an administrator in the possession of and exercising complete control over the real property of his decedent, when his right to so protest was not challenged by the heirs or devisees of the decedent, was an "owner" of real estate with-

in the meaning of the statute concerning the issuance of bonds for street improvements. We also held that a guardian in like control of the real estate of his ward and certain other parties (not relevant here) were "owners" within the meaning of that statute. These rulings can be explained by the fact that while the record owner per se was not protesting, one tantamount to the record owner was acting in the owner's behalf. The full and complete fee simple title had been placed in someone other than the record owner by operation of law; in one case as a transitional convenience (executor), and in the other as a safety measure for a temporary and indefinite term (guardian). Nowhere in that opinion was a mere lessee, one who is in no wise vested with anything approaching the totality of fee simple ownership, treated as or argued to be an "owner."

Appellees further cite *Portsmouth Savings Bank v. City of Omaha,* 67 Neb. 50, 93 N.W. 231 (1903), in support of their position. This case, however, in fact distinguishes between those who hold the full and complete fee simple title to the property and those who do not. The protesting signers were the life tenant and the trustee of the property at issue (the life tenant was also a trustee). We concluded that the right to protest must reside in the trustees of the property; this comports with the instant analysis that those who hold the full fee simple title are the rightful protestants, since, under the terms of the will which created the trust in *Portsmouth Savings Bank, supra,* the trustees were vested with full fee simple title until such time as the death of the life tenant. Appellees also argue that *Offutt Housing Co. v. County of Sarpy,* 160 Neb. 320, 70 N.W.2d 382 (1955), holding that a lessee under a 75-year lease was liable for personal property taxes on the improvements and leasehold interest, treats a lessee as the equivalent of an absolute owner. However, a careful reading of that case indicates we merely said that, for practical purposes, a lease for a term

of 75 years *could* be the equivalent of absolute ownership. Further, the question was considered only in the context of the assessability of private personalty placed on leased public lands. That case, therefore, is inapposite.

Finally, the conceptual delineation between those who have full and complete fee simple ownership as against those who do not was also followed in *Bonner v. City of Imperial,* 149 Neb. 721, 32 N.W.2d 267 (1948), wherein we held, citing with approval *Chan, supra,* that one coowner of a parcel of real estate could object to improvements for himself and the other coowner, and that that objection would be taken to represent the entire ownership interest in the property, unless the other owner caused a contrary showing. Again, our concern was with those who had the totality of the fee simple ownership of the parcel at issue. Bare lessees cannot be said to represent fee simple ownership, no matter how long the term. If the lessee obligates himself to pay assessments, it is a matter of contract by which the lessee has, as part of his bargained-for exchange, agreed to assume the risk of paying special assessments. The fee owner's interest and the lessee's interest may diverge at this point. It may be in the fee owner's interest to see as many special benefits accrue to his property as possible, particularly if the lessee is obligated to pay for them; it may or may not be in the lessee's interest to see those benefits accrue. However, the issue is not who has contractually assumed the risk of paying for these benefits, if any; it is rather who is the "owner" within the meaning of the statute providing for creation of the district. In view of the above case law, only the fee simple owner can be said to be the "owner." The cases from jurisdictions cited to us by the parties on either side of the question are not persuasive in the face of our own law. Accordingly, the protests of the lessees were correctly considered by the trial court to be invalid.

This then leaves but 1,227 front feet of protests (the 1,671 feet of protests claimed to be valid by appellees less the 444 feet of lessee protests) in dispute. If all of these were valid, a fact we do not decide, appellees could, by adding them to the 9,606.41 feet of unquestioned protests, only muster a total of 10,833.41 front feet of valid protests. This would still leave appellees 2.505 feet short of the 10,835.915 required. That being the case, there is no need to consider the remaining issues, and we do not do so.

The judgment of the trial court is therefore reversed with directions to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STEVE FOWLER, APPELLANT, V. NEBRASKA ACCOUNTABILITY AND DISCLOSURE COMMISSION, APPELLEE.

330 N.W.2d 136

Filed February 4, 1983. No. 81-721.

Constitutional Law: Statutes. A statute proscribing otherwise free speech activity which "harasses" others, without setting forth standards comprising such harassment, is constitutionally infirm as vague because it impermissibly delegates to others, indiscriminately, the resolution, on an ad hoc and subjective basis, of the meaning of such term.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and dismissed.

Kirk E. Naylor, Jr., for appellant.

Bernard Wishnow, NADC General Counsel, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

Following a hearing before the Nebraska Accountability and Disclosure Commission, it was determined that the plaintiff, Steve Fowler, had violated the provisions of Neb. Rev. Stat. § 49-14,132 (Reissue 1978), and he was ordered to pay a civil penalty of $100 to the State of Nebraska. He appealed that order, which, after hearing, was affirmed by the District Court. He appeals to this court, assigning as error the unconstitutionality of the statute under the provisions of the first and fourteenth amendments to the Constitution of the United States and the provisions of article I, § 6, of the Constitution of the State of Nebraska.

The Nebraska Political Accountability and Disclosure Act, Neb. Rev. Stat. §§ 49-1401 et seq. (Reissue 1978), contains 138 sections, requiring, among other things, that so-called political action committees file with the commission created by this act a statement reflecting contributions made to any political candidate. § 49-1454. Section 49-14,132 provides in part that "Campaign statements . . . shall not be . . . used by any person for any commercial purpose, for soliciting contributions, ticket sales or other political campaign purposes, or for harassment by a governmental body or any other person." A civil penalty for a violation of this act may be imposed in an amount not exceeding $1,000. § 49-14,126.

During the year 1980 the plaintiff was engaged in a political campaign, seeking reelection as a member of the Nebraska Legislature. One of the issues of that campaign was the amount of contributions to both candidates made by political action committees and the interests which they represented. The plaintiff concedes that he obtained from the records of the Nebraska Accountability and Disclosure Commission certain information relating to contributions made to his opponent's campaign by several political action committees. He then sent a form letter and questionnaire to each of those committees. Gen-

erally, the import of the questionnaire was to ascertain if the decision to support a candidate was approved by the full membership of the organization; whether the decision to support the plaintiff's opponent was based primarily upon a dissatisfaction with the plaintiff's record in the Legislature or a particular interest in his opponent; and whether the decision was based on a particular vote or votes of the plaintiff as a legislator. These letters and questionnaires were mailed to approximately 12 committees.

Apparently only two responses were received by the plaintiff. One committee simply replied that it had filed its report with the commission and therefore felt that it had fully complied with the law. The other response was in considerable detail and seemed to answer the questions submitted. The introductory paragraph of that response was as follows: "Your inquiry and questionnaire addressed to [us] came as a bit of a shock. In fact, it seemed a little like a challenge of our right to support the political candidate of our choice. However, I will assume that it was sincere."

It is on the basis of this activity that the plaintiff was charged with a violation of the statute. Because the written charge and the findings of the commission were couched in general terms, we do not know whether the plaintiff's alleged violation was due to his use of the statement for "other political campaign purposes" or for "harassment."

At the outset, we would observe that little time or effort was devoted by either party in brief or argument to the issue of "other political campaign purposes." *Buckley v. Valeo,* 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), is cited by both of them. The essential holding of that case, insofar as it is important to a decision here, is that there may be a substantially compelling public interest in the political process to justify a governmental requirement which compels disclosure of financial contributions

vis-a-vis the first amendment right of free speech.

Interestingly enough, a portion of the Federal Election Campaign Act of 1971 (2 U.S.C. § 438(a)(4) (1976)), which was involved in the litigation in *Buckley,* was similar to § 49-14,132 of the Nebraska Political Accountability and Disclosure Act, and read in part as follows: "*Provided,* That any information copied from such reports and statements shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose . . . ." *Id.* at 173.

In commenting on that very section of the Federal Election Campaign Act, the defendant quotes, at 11 in its brief, Federal Election Commission Advisory Opinion 1980-101 in part as follows: " 'This exception allows for the use of information copied or otherwise obtained from reports filed with the Commission in newspapers, books or the like, but only if the principal purpose of these communications is not to communicate any contributor information for the purpose of soliciting contributions or for other commercial purposes.' " And at 12 in its brief, defendant quotes Federal Election Commission Advisory Opinion 1980-78 in part as follows: " 'The focus of the proponents of 2 U.S.C. § 438(a)(4) centers on protecting the privacy of the "very public spirited citizens" who make contributions to campaigns. The principal, if not the sole, purpose of the provision was to protect contributor information lists from being used for commercial purposes.' " Similar language is found in *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978): "We agree that protection of the public from these aspects of solicitation [fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct'] is a legitimate and important state interest." *Id.* at 462.

Buckley goes on to explain the governmental interests sought to be vindicated by the disclosure requirements of the Federal Election Campaign Act:

"First, disclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

"Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return." *Id.* at 66-67.

The purpose of the rather lengthy quotation from *Buckley* is simply to point out that the very objective to be achieved—publicity as to campaign contributions and how they affect the political process—and that which justifies the governmental interest in interfering with first amendment free speech rights, is the very thing which the Nebraska statute seeks to inhibit.

In *Com. v. Wadzinski,* 492 Pa. 35, 422 A.2d 124 (1980), the defendant was convicted of a violation of a statute which required that no candidate for public office shall make a public statement which makes reference to an opposing candidate without providing in advance to that opposing candidate a copy of the proposed statement. In striking down that statute the court said: "From the foregoing, it is readily apparent that the broad sweep of the Section 1614 notice requirement places a substantial burden on

the candidate's ability to engage in protected political discourse. Further, the inhibitory effect of that requirement will in many cases work directly counter to the governmental interest in providing voter access to accurate information about candidates and to robust debate on the issues. In summary, even a cursory look at the statute's probable operation demonstrates that its potential for suppressing vital last-minute political expression is equally as grave as that considered in *Mills v. Alabama, supra.* It follows from *Mills* that since the governmental interest asserted in support of the statute, although a legitimate and important one, is inadequate to justify the substantial burden imposed on protected speech, the statute must fall." 422 A.2d at 132.

We conclude that § 49-14,132, which prohibits the use of public information for "other political campaign purposes," as it was applied in this case, places an impermissible burden on protected speech and must fall as being overbroad. There remains the question of whether or not the term "harassment," as prohibited by the statute, is also constitutionally unacceptable as vague or overbroad.

Webster's Third New International Dictionary, Unabridged (1968) defines "harass" as follows: "2 a : to tire out (as with physical or mental effort) : EXHAUST, FATIGUE . . . b : to vex, trouble, or annoy continually or chronically (as with anxieties, burdens, or misfortune) : PLAGUE, BEDEVIL, BADGER . . . ."

Both parties rely on *Grayned v. City of Rockford,* 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). An antinoise ordinance, which was challenged on the grounds of vagueness, read in part as follows: " '[N]o person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. . . .' " *Id.* at 107-08.

Contained in the opinion of Mr. Justice Marshall is an excellent discussion of the ingredients of vagueness. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to ' "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.' " *Id.* at 108-09.

The court then went on to conclude: "Although the question is close, we conclude that the antinoise ordinance is not impermissibly vague. . . . Condemned to the use of words, we can never expect mathematical certainty from our language. The words of the Rockford ordinance are marked by 'flexibility and reasonable breadth, rather than meticulous specificity,' [citation omitted] but we think it is clear what the ordinance as a whole prohibits. Designed, according to its preamble, 'for the protection of Schools,' the ordinance forbids deliberately noisy or diversionary activity that disrupts or is about to disrupt normal school activities. It forbids this willful activity at fixed times—when school is in session—and at a sufficiently fixed place

—'adjacent' to the school. Were we left with just the words of the ordinance, we might be troubled by the imprecision of the phrase 'tends to disturb.' However, in *Chicago v. Meyer* . . . [citation omitted] the Supreme Court of Illinois construed a Chicago ordinance prohibiting, *inter alia,* a 'diversion tending to disturb the peace,' and held that it permitted conviction only where there was '*imminent* threat of violence.' " (Emphasis in original.) *Id.* at 109-11.

Interestingly enough, in the instant case, the definition of harassment apparently was delegated to supposed victims "for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." In the defendant Nebraska Accountability and Disclosure Commission's brief, the only suggestion of a standard to determine the meaning of harassment was a statement that "As shown by NADC Ex. 4, ¶¶ 5 to 9, and as found by the Commission and the District Court, the recipients of the letter and questionnaire were 'harassed.' " In other words, "harassment" was present because someone felt "harassed." Defendant obviously has reference to that portion of the letter quoted earlier in which the author said, "Your inquiry . . . came as a bit of a shock," and to the fact that other recipients of the letter discussed what should be done about it.

However, such a contention is completely answered by the case of *Coates v. City of Cincinnati,* 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971). The ordinance in question there made it a criminal offense for " 'three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . .' " *Id.* at 611. The Ohio Supreme Court, in upholding the validity of the ordinance, said that " 'The word "annoying" is a widely used and well understood word; it is not necessary to guess its meaning. "Annoying" is the present participle of the transitive verb "annoy" which means to trouble,

to vex, to impede, to incommode, to provoke, to *harass* or to irritate.' " (Emphasis supplied.) *Id.* at 612.

However, the Supreme Court of the United States struck down the ordinance. In pointing out the limited construction placed on the ordinance by the Ohio court, the opinion went on to state: "But the court did not indicate upon whose sensitivity a violation does depend—the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man.

"We are thus relegated, at best, to the words of the ordinance itself. . . . In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.

"Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.' [Citation omitted.]" *Id.* at 613-14.

On the basis of the foregoing reasoning, we find that the statute in question is both unconstitutionally vague and overbroad. Consequently, the judgment of the District Court is reversed and the action ordered dismissed.

REVERSED AND DISMISSED.

ANN K. ALBERS, APPELLANT, V. ROBERT J. ALBERS, APPELLEE.

329 N.W.2d 567

Filed February 4, 1983. No. 81-752.

Modification of Decree: Appeal and Error. In actions for the modification of dissolution proceedings, it is the duty of this court to review de novo the determination of the District Court with regard to whether a change in circumstances has occurred which justified the modification of the original decree.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Reversed.

Thomas R. Wolff, for appellant.

D. L. Pelton of Pelton, Bertolini & Schroeder, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

WHITE, J.

This is an appeal from the judgment of the District Court for Sarpy County, Nebraska, which modified an award of alimony contained in a decree of dissolution dated May 13, 1974.

The decree provided: "It Is Further Ordered that Respondent is required to pay to the Petitioner as alimony, the sum of $300.00 per month commencing May 1, 1974, until May 1, 1976, and thereafter at a rate of $400.00 per month until the death or remarriage of the Petitioner."

The May 1, 1976, date for the increase of alimony payments was apparently related to a time when the child support obligations of the respondent were reduced or terminated.

The trial court found that good cause was shown "for modifying the order for alimony." Appellant, Ann K. Albers, appeals.

At the time of the dissolution proceeding, appellee, Robert J. Albers, was a member of the U.S. Air Force and was contemplating retirement. He was a

lieutenant colonel with 19 years of service, earning approximately $1,800 per month. Appellee subsequently retired from the service in 1981 and was receiving a military pension at the time of modification of 62½ percent of his highest base pay, plus certain cost-of-living allowances, Veterans Administration educational benefits, and also land contract and bond income which amounted to a total of $2,200 per month.

Appellee was attending college at the time of modification, seeking a degree in industrial arts and education and looking forward to a second career as a high school industrial education teacher.

The parties had two sons, ages 15 and 17, at the time of dissolution. When the hearing on modification was held, the child support obligations had terminated, although one of the children was completing his college education, to which appellee had contributed approximately $183 per month after age 19.

The evidence at the dissolution proceeding showed that appellant was not employed outside the home but was working toward obtaining her college degree. At the modification hearing appellant had graduated from the College of Bellevue with a degree in sociology. She had an income of approximately $700 per month working as a travel consultant, owned her own home, and had savings of approximately $9,000.

The appellee points to the change in circumstances in both his and the appellant's case, which he contends justifies the court's modification of the alimony award.

Appellant argues strenuously to this court that all of the conditions which led the district judge in the dissolution action to make the alimony award were still present at the time of modification and were planned and anticipated by each of the parties, except for the possible remarriage of the appellee.

"[I]n actions for the modification of dissolution

proceedings, it is the duty of this court to review de novo the determination of the District Court with regard to whether a change in circumstances has occurred which justified the modification of the original decree." *Chamberlin v. Chamberlin,* 206 Neb. 808, 814, 295 N.W.2d 391, 395 (1980); *Howard v. Howard,* 196 Neb. 351, 242 N.W.2d 884 (1976).

It is true, as the trial court observed, that this court has not favored lifetime awards for alimony; however, the fact remains that, save and except for the remarriage, all circumstances present at the dissolution hearing were contemplated and kept in mind by the judge who originally made the award. We observed in *Chamberlin v. Chamberlin, supra* at 815, 295 N.W.2d at 395-96: "He had further contended that Helen has shown ability and initiative in her pursuit of employment. It is likewise true that, because of her good stewardship, she has accumulated a considerable amount of assets which will produce income after her impending retirement. However, we do not believe that she should be penalized for using such ability and initiative." We have previously said that the reaching of the age of majority of the children is not a factor to be considered in the reduction of an alimony award. *Chamberlin v. Chamberlin, supra.*

The fact that appellee continues to recognize an obligation to contribute to his natural child's education is a circumstance that, independent of a dissolution of a marriage, is no different from the remainder of the working population that has children.

The trial court declined to point out specifically what change of circumstances existed which justified the modification. We conclude that any changes in circumstances were within the contemplation of the parties, were accomplished by the mere passage of time, and do not arise to the level to justify the change or modification of the order. Accordingly, we reverse.

REVERSED.

McCOWN, J., dissenting.

This case is a classic example of the reasons lifetime awards of alimony are seldom appropriate. Periodic alimony is an award for appropriate maintenance and support, and its continuation or modification is affected by the financial circumstances of both parties. It is not a permanent judgment unaffected by the financial circumstances of either party. To treat substantial permanent changes in a wife's financial circumstances, regardless of the source, as being immaterial simply converts periodic alimony to permanent alimony terminable only by remarriage or death.

BOSLAUGH, J., joins in this dissent.

JASPER FALKNER, APPELLANT, V. NEBRASKA BOARD OF PAROLE AND NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEES.

330 N.W.2d 141

Filed February 4, 1983. No. 82-036.

1. **Criminal Law: Sentences.** A prisoner serving an Iowa sentence who is transferred to Nebraska pursuant to the Interstate Corrections Compact remains subject to the jurisdiction of Iowa.
2. ____ : ____. A Nebraska parole violator who is serving an Iowa sentence imposed for a subsequent offense does not recommence serving his Nebraska sentence until he has been released from custody by Iowa and arrested for the custody of the Nebraska Board of Parole.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch, for appellant.

Paul L. Douglas, Attorney General, and Lynne Rae Fritz, for appellees.

KRIVOSHA, C.J., BOSLAUGH, McCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

BOSLAUGH, J.

The plaintiff, a prisoner confined in the penal complex, brought this action to determine the date on which he is entitled to be released from custody.

On August 16, 1972, the plaintiff was sentenced to imprisonment for 7 to 8 years by the District Court of Douglas County, Nebraska. He was paroled on March 16, 1978.

On June 3, 1978, the plaintiff was arrested in Council Bluffs, Iowa. He was sentenced to imprisonment in Iowa for not to exceed 5 years on October 18, 1978. This sentence was later amended to provide that it should run concurrently with any sentence the plaintiff might serve in Nebraska.

A probable cause hearing on revocation of the Nebraska parole was held in Council Bluffs, Iowa, on July 7, 1978. On February 23, 1979, the plaintiff was transferred to Nebraska under the provisions of the Interstate Corrections Compact. The Nebraska parole was revoked at a formal hearing on March 5, 1979. On November 21, 1979, the plaintiff was returned to Iowa.

On December 4, 1980, the plaintiff was paroled by Iowa, released to the custody of Nebraska, and returned to Nebraska. The Department of Correctional Services determined that the plaintiff did not recommence serving his Nebraska sentence until December 4, 1980. The plaintiff contends the time between February 23, 1979, and December 4, 1980, when he was in the physical custody of Nebraska should be credited against his Nebraska sentence. The trial court held that the determination made by the Department of Correctional Services was correct.

Neb. Rev. Stat. § 83-1,123(2) (Reissue 1981) provides: "(2) The time from the date of his declared delinquency until the date of his arrest for the custody of the Board of Parole shall not be counted as any portion of the time served." The issue to be determined is, When was the plaintiff "arrested

for the custody of the Board of Parole"?

Under the provisions of article IV(c) of the Interstate Corrections Compact, Neb. Rev. Stat. § 29-3401 (Reissue 1979), an inmate confined in an institution in a receiving state is at all times "subject to the jurisdiction of the sending State." A receiving state may refuse to return an inmate only if a criminal charge against the inmate is pending in the receiving state. See, § 29-3401, art. V(a); *State ex rel. Jakes v. Nebraska Board of Parole,* 212 Neb. 181, 322 N.W.2d 394 (1982).

We think the decision of the trial court was correct. When the plaintiff was returned to Nebraska on February 23, 1979, he remained subject to the jurisdiction of Iowa. Although confined in Nebraska, he continued to serve the Iowa sentence. The fact that the Iowa sentence was concurrent with any Nebraska sentence was of no consequence here because the plaintiff had not recommenced serving his Nebraska sentence. See *Williams v. State,* 280 N.W.2d 406 (Iowa 1979).

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLIFFORD C. LUTHER, APPELLANT.

329 N.W.2d 569

Filed February 4, 1983. No. 82-068.

Pleas. A plea of nolo contendere must not only be intelligently and voluntarily made to be valid but the record must affirmatively disclose that the plea was entered understandingly and voluntarily.

Appeal from the District Court for Custer County: JAMES R. KELLY, Judge. Reversed and remanded.

Paine & Huston, for appellant.

Paul L. Douglas, Attorney General, and Frank J. Hutfless, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

CAPORALE, J.

Defendant-appellant, 71-year-old Clifford C. Luther, was sentenced by the Custer County Court on two counts of third degree sexual assault following nolo contendere pleas. These sentences were subsequently affirmed by the District Court. We reverse.

Among other errors the defendant contends that the District Court erred in finding that the defendant knowingly and voluntarily waived his rights at the time the operative pleas were entered.

The record discloses defendant appeared with counsel at the arraignment before the county court. That court advised the defendant of his constitutional rights. The defendant stated he understood them, and when asked how he would plead he stated: "If I was guilty I'd feel guilty. And I don't feel guilty so I'll plead not guilty." At the scheduled trial, approximately 2 months later, counsel for the parties advised the county court that a plea bargain had been reached. The court was advised by the State that the defendant had agreed to enter nolo contendere pleas to each count in exchange for which the State agreed to request a $700 fine and a year's supervised probation for both counts and to not file other criminal charges. A sketchy factual basis for the charges was recited by the State, and defendant's counsel entered pleas of nolo contendere to each count. The court inquired of defendant's counsel whether the nolo contendere pleas were made willingly and understandingly and whether the defendant understood that he was subject to the same penal provisions as emanate from a guilty plea. Defendant's counsel replied: "That's correct Your Honor." The record fails to reveal any conversations directly between the county judge and the defendant. When the court made inquiry about a

presentence investigation, defendant's counsel advised that the defendant would like to have the matter concluded as quickly as possible to "cut his expenses." A presentence investigation was conducted, which apparently was never shown to defendant or defendant's counsel. At the sentencing hearing the county judge asked defendant's counsel whether he or defendant had anything to say before he pronounced sentence. After a statement by defendant's counsel, the judge sentenced defendant to 30 days in the Custer County jail on each count, the sentences to run concurrently, imposed a $1,000 fine on each count, and imposed supervised probation for a period of 1 year.

In *State v. Turner,* 186 Neb. 424, 183 N.W.2d 763 (1971), we adopted the rule of *Boykin v. Alabama,* 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), to the effect that a plea of guilty must not only be intelligently and voluntarily made to be valid but the record must affirmatively disclose that the plea was entered understandingly and voluntarily. Although the pleas entered here were pleas of nolo contendere rather than guilty, the results emanating from those nolo contendere pleas are substantially the same as those which would have emanated from pleas of guilty. In this jurisdiction a plea of nolo contendere is equivalent to, and places a defendant in the same position as, a plea of guilty. *State v. Kluge,* 198 Neb. 115, 251 N.W.2d 737 (1977); *State v. Abramson,* 197 Neb. 135, 247 N.W.2d 59 (1976). In the context of this case no distinction exists between them.

In *State v. Benson,* 199 Neb. 549, 260 N.W.2d 208 (1977), we made reference to the ABA Standards Relating to Pleas of Guilty and nolo contendere, including the need for the record to demonstrate the voluntariness of the plea. See, also, *State v. Fowler,* 201 Neb. 647, 271 N.W.2d 341 (1978), wherein we again referred to *Boykin* as reviewed in *Turner* and stated that before accepting a guilty plea the judge is expected to examine the defendant to determine

whether he understands the nature of the charge, the possible penalty, and the effect of his plea.

Since the record fails to indicate that the county judge examined the defendant in the manner required by *Turner* at the time the nolo contendere pleas were entered on defendant's behalf, it cannot be said the record demonstrates that the pleas were entered knowingly and understandingly by the defendant.

In view of the foregoing determination we need not consider defendant's other assignments of error.

The judgment of the District Court affirming the sentences imposed by the county court must therefore be reversed and the matter remanded for further proceedings.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. LARRY A. WORKMAN, APPELLANT.

329 N.W.2d 571

Filed February 4, 1983. No. 82-345.

1. **Circumstantial Evidence.** One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence established guilt beyond a reasonable doubt.
2. **Criminal Law: Evidence: Proof.** To sustain a conviction for a crime, the corpus delicti must be proved beyond a reasonable doubt.
3. **Arson: Evidence: Proof.** In order to establish the corpus delicti in an arson case, it is necessary that the evidence disclose the burning of the property as charged and that the burning was caused by the willful act of some person criminally responsible.

Appeal from the District Court for Johnson County: ROBERT T. FINN, Judge. Reversed and dismissed.

Raymond P. Atwood, Jr., of The Healey Law Offices, for appellant.

Paul L. Douglas, Attorney General, and Mel Kammerlohr, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

KRIVOSHA, C.J.

The appellant, Larry A. Workman, was found guilty of arson in the second degree in violation of Neb. Rev. Stat. § 28-503(1) (Reissue 1979). He appeals from that order, maintaining that the trial court should have sustained his motion to dismiss, made both at the close of the State's case and again at the close of all the evidence, for the reason that the evidence introduced at the trial was, as a matter of law, insufficient to submit the case to the jury. We have carefully reviewed the record and agree with Workman. For that reason the judgment entered by the trial court, based upon the jury's verdict, is reversed and the action dismissed.

On August 20, 1981, at approximately 3:30 a.m., the Tecumseh Fire Department was called to a fire at 531 Calhoun Street in the city of Tecumseh, Nebraska. An unoccupied residence owned by Workman's brother, LeRoy Workman, was on fire. Further investigation disclosed that the fire originated in a small bathroom closet located near the rear of the house. Authorities were unable to testify as to the source of the ignition of the fire, though there was some belief that the fire was set. In the opinion of a member of the State Fire Marshal's office, the fire was caused by a flammable accelerant present on the floor of the closet area located adjacent to the bathroom. He held to this opinion even though laboratory tests conducted on the debris for accelerants were negative. No one was able to place Workman anywhere near the scene of the fire. However, a member of the Tecumseh Police Department, Patrolman Thomas Sherman, testified that prior to the fire, at about 2:21 a.m., from a distance of 10 or 15 feet, he observed a vehicle 300 or 400 feet from the

residence, bearing license number 48-R198 and registered to Larry Workman. While the State was able to establish that the license plate was issued to Workman, it was unable to establish that Workman owned the vehicle upon which Sherman saw the license plate. Officer Sherman testified that when he observed the vehicle in Tecumseh there were two subjects in the vehicle, but he was not able to observe or identify either person. Officer Sherman further testified that he followed the vehicle out of Tecumseh and that there was no doubt in his mind that the vehicle was dark in color. The evidence established that Workman's vehicle found in Elmwood was light in color. Other than Officer Sherman's testimony as to the presence of Workman's license plate number on a vehicle seen in Tecumseh more than an hour before the fire, there was no other testimony placing Workman at or near the scene of the fire, or at or near Tecumseh. The following morning a member of the State Fire Marshal's office went to Elmwood, Nebraska, where he located the owners of the property. Upon arrival in Elmwood, he saw a vehicle bearing the license number earlier identified by the patrolman. Workman later gave a statement to authorities admitting that he owned the car bearing the license number 48-R198, but claiming that he had not been in Tecumseh for a year and that he had gone to bed at his brother's home in Elmwood at approximately 11 p.m. on the night of the fire.

The evidence offered by the State was, at best, circumstantial. It is true that one accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence established guilt beyond a reasonable doubt. *State v. Bartholomew,* 212 Neb. 270, 322 N.W.2d 432 (1982). In the case of *State v. Buchanan,* 210 Neb. 20, 28, 312 N.W.2d 684, 689 (1981), we said: "One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence es-

tablishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt. [Citations omitted.]"

Accepting our statement in *State v. Buchanan,* we believe the evidence in this case is not sufficient to have permitted the jury to find guilt beyond a reasonable doubt. As we noted in *Harms v. State,* 147 Neb. 857, 859, 25 N.W.2d 287, 288 (1946): "To sustain a conviction for a crime the corpus delicti must be proved beyond a reasonable doubt. Maher v. State, 144 Neb. 463, 13 N.W.2d 641." In *State v. Keeton,* 199 Neb. 405, 409, 259 N.W.2d 277, 280 (1977), we held: " 'The corpus delicti in an arson case consists of two elements, the burning of the property and the criminal act of someone in causing the burning.

" 'In order to establish the corpus delicti in an arson case, it is necessary that the evidence disclose the burning of the property as charged, and that the burning was caused by the willful act of some person criminally responsible.' " The mere fact that the property was burned and the origin of the fire unknown is not evidence that it was feloniously set. The presumption is that the fire was not of criminal origin. Evidence of motive alone is not sufficient to sustain a conviction. *Harms v. State, supra.* In the instant case the record not only fails to disclose that the fire was feloniously set but, moreover, fails in any manner to reasonably connect the setting of the fire with Workman. The officer's testimony that more than an hour before the fire he saw Workman's auto plates on a car not owned by Workman, with nothing more, does not constitute sufficient evidence to establish guilt beyond a reasonable doubt. In the instant case the testimony linking Workman to the fire was of so weak or doubtful a character that a conviction based thereon could not have been sustained. The trial court should have sustained the motion for a directed verdict made at the close of the State's case. See *State v. Webb,* 197 Neb. 662, 250 N.W.2d 625 (1977). Having failed to do so, we

reverse the decision of the trial court and order that the action be dismissed.

REVERSED AND DISMISSED.

CLINTON, J., not participating.

FARUQ AL-HAFEEZ, ALSO KNOWN AS RAYMOND L. MOSS, APPELLANT, V. WILLIAM J. FOSTER, SUPERINTENDENT, LINCOLN CORRECTIONAL CENTER, APPELLEE.

329 N.W.2d 573

Filed February 4, 1983. No. 82-441.

1. **Habeas Corpus.** Habeas corpus is not available to attack mere errors at trial from which a direct appeal could have been taken.
2. _____. Unless the granting of relief in a habeas corpus action will result in the immediate release from custody, the petition for such relief is premature.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Faruq Al-Hafeez, pro se.

Paul L. Douglas, Attorney General, and Shanler D. Cronk, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

WHITE, J.

The plaintiff was convicted of sodomy, robbery, and the use of a firearm in the commission of a felony. The conviction was affirmed in *State v. Moss,* 187 Neb. 391, 191 N.W.2d 543 (1971). Post conviction relief was denied by the trial court and the denial affirmed in *State v. Moss,* 191 Neb. 36, 214 N.W.2d 15 (1973).

The plaintiff filed his petition for habeas corpus and relief was denied by the District Court. He appeared pro se. Four issues are raised in this appeal. The first three issues relate to the giving or failure to give certain instructions. The trial record was

not introduced as evidence and the instructions are not before us and cannot be considered. We are unable to say whether the instructions were erroneous or whether, if erroneous, they rose to such a violation of constitutional rights as to deny the defendant a fair trial. Habeas corpus is not available to attack mere errors at trial from which a direct appeal could have been taken. *Schleuter v. McCuiston,* 203 Neb. 101, 277 N.W.2d 667 (1979).

The fourth issue raised is the constitutionality of Neb. Rev. Stat. § 28-1011.21 (Cum. Supp. 1969).

The plaintiff was sentenced to a term of from 10 to 15 years for sodomy, a concurrent sentence of from 25 to 30 years for robbery, and a consecutive term of 5 years for the use of a firearm to commit a felony. If the plaintiff were successful, he would remain subject to incarceration for the unserved portions of the remaining charges. The petition was premature and cannot be granted. *Piercy v. Parratt,* 202 Neb. 102, 273 N.W.2d 689 (1979); *Gamron v. Parratt,* 199 Neb. 163, 256 N.W.2d 867 (1977).

The trial court's denial of relief is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, APPELLEE, V. JOY SPORHASE ET AL., APPELLANTS.

329 N.W.2d 855

Filed February 11, 1983. No. 43206.

Waters: Statutes. The portion of Neb. Rev. Stat. § 46-613.01 (Reissue 1978), to wit, "if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska," may be severed from the rest of the statute because it did not constitute an inducement to the passage of § 46-613.01, does not make the act inoperative, and will not frustrate the intent of the Legislature. The remainder of § 46-613.01, after the unconstitutional portion is stricken, remains a viable statute.

On remand from the U.S. Supreme Court. Judgment of severance.

Richard A. Dudden and Padley & Dudden, P.C., for appellants.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

WHITE, J.

The Supreme Court of the United States in *Sporhase v. Nebraska ex rel. Douglas,* ____ U.S. ____, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982), reversed the judgment of this court and remanded the matter to this court, holding that since the reciprocity requirement of Neb. Rev. Stat. § 46-613.01 (Reissue 1978) violates the commerce clause, "[w]e leave to the state courts the question whether the invalid portion is severable." 102 S. Ct. at 3467.

In *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981), this court held that underground water was not an article of commerce in this state, was the subject of public ownership, and thus regulations governing the use of such water, as well as prohibiting its export to nonreciprocating states, did not violate the commerce clause of U.S. Const. art. I, § 8, relying on *Hudson Water Co. v. McCarter,* 209 U.S. 349, 28 S. Ct. 529, 52 L. Ed. 828 (1908).

While declaring that this court erred in holding that underground water was not an article of commerce, the U.S. Supreme Court did not declare illegal the statutory scheme for conservation and preservation of ground water. Rather, on a variety of theories, the Court approved the general scheme, e.g., "unexercised federal regulatory power" and "measures taken by a State to conserve and preserve for its own citizens this vital resource in time

of severe shortage." *Sporhase v. Nebraska ex rel. Douglas,* 102 S. Ct. at 3463-64.

We are then called on to decide purely as a matter of state law whether the emphasized portion of § 46-613.01 is severable. That section provides: "Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit *if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.*" (Emphasis supplied.)

This court has variously expressed the test to be applied in determining whether an unconstitutional clause in a statute may be severed from the remainder. (1) Whether, when absent the invalid portions, a workable plan remains. *Nelsen v. Tilley,* 137 Neb. 327, 289 N.W. 388 (1939). (2) Whether the valid portions of an act can be enforced independently, and where the invalid portions do not constitute such an inducement to the valid parts that the valid parts would not have passed without the invalid parts. *State v. Padley,* 195 Neb. 358, 237 N.W.2d 883 (1976). (3) Whether the severance will do violence to the intent of the Legislature. *Chase v. County of Douglas,* 195 Neb. 838, 241 N.W.2d 334 (1976). (4) Whether a declaration of separability is included in the act, indicating that the Legislature would have enacted the bill absent the invalid portion. *State ex rel. Meyer v. County of Lancaster,* 173 Neb. 195, 113 N.W.2d 63 (1962); *Nelsen v. Tilley, supra.*

All the parties urge the court that the provision is severable in applying the tests described. We agree.

An examination of Chapter 46, article 6, reveals a comprehensive and complete approach to the conservation and beneficial use of ground water. The striking of the provision prohibiting transfer of water to nonreciprocating states does not weaken or otherwise impair the operation of the act. The valid portions present a complete, workable plan independent of the invalid portions.

The parties concede that no legislative history exists which proves or tends to prove that the invalid portions were an inducement to the passage of the act. Indeed, they point to a severability clause in 1969 Neb. Laws, Ch. 9, § 72, p. 145, containing amendments to § 46-613.01 as indicative of a contrary intent.

The briefs of the parties cite at great length the comments in floor debate and committee reports of members of the Legislature. The purpose of § 46-613.01 and the remainder of Chapter 46 was to conserve and apply to beneficial use an important Nebraska resource. No justification exists to assert that this important aim is frustrated by the severance of the invalid portion. On the contrary, the reverse appears to be abundantly clear.

We hold that severance of the portion of § 46-613.01, to wit, "if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska," did not constitute an inducement to the passage of § 46-613.01, does not make the act inoperative, and will not frustrate the intent of the Legislature. The remainder of § 46-613.01, after the unconstitutional portion is stricken, remains a viable statute.

JUDGMENT OF SEVERANCE.

ESTHER BEYNON, APPELLANT, V. BOARD OF EQUALIZATION OF LANCASTER COUNTY, NEBRASKA, APPELLEE.

329 N.W.2d 857

Filed February 11, 1983. No. 81-578.

1. **Taxation: Valuation: Appeal and Error.** In an appeal from property tax valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.
2. **Taxation: Valuation: Presumptions.** There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Ira D. Beynon and John H. Sohl, for appellant.

Ron Lahners, Lancaster County Attorney, Michael G. Heavican, and Douglas D. Cyr, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, HASTINGS, and CAPORALE, JJ.

MCCOWN, J.

This is a direct appeal by the owner of an improved quarter section of agricultural land situated in Lancaster County, Nebraska, from the action of the county board of equalization fixing the valuation of plaintiff's land for tax purposes for 1980. Plaintiff's protest was denied by the county board of equalization, and on appeal the District Court affirmed the action of the county board of equalization.

Plaintiff is the owner of 160 acres of improved agricultural land in Lancaster County, specifically described in the petition. For the 1979 tax year plaintiff's property was initially assessed at the value of $90,900 and lowered by the county board of equalization to a valuation of $83,200.

For the tax year 1980, in accordance with statute, county assessors were directed to use the Nebraska Agricultural Land Valuation Manual, duly promulgated by the Tax Commissioner, to appraise and assess agricultural property for tax purposes. The value placed on plaintiff's property by the county assessor for tax purposes for 1980 was $115,815.

Plaintiff protested the 1980 valuation and sought to reduce the valuation of the property to the 1979 valuation. The Lancaster County Board of Equalization denied the protest and the plaintiff appealed to the District Court.

At the hearing in the District Court plaintiff offered no evidence that the property was valued in excess of its actual value. Neither did the plaintiff present any expert witnesses to testify as to the actual value of plaintiff's land or its value in comparison to other similar properties. Plaintiff's evidence was aimed at discrediting the valuation methods utilized by the county assessor as to plaintiff's property and contending that the 1979 appraisal value was more accurate than the 1980 value obtained by use of the Nebraska valuation manual.

The county assessor testified that the Nebraska Agricultural Land Valuation Manual was used to value plaintiff's property for tax purposes for 1980, and that all agricultural land in the county was valued in the same manner as plaintiff's property. The assessor also testified that the reason plaintiff's 1980 valuation was substantially higher than the 1979 value was that the plaintiff's property was undervalued in 1979.

A licensed appraiser and rural property supervisor for the assessor's office testified that the 1980 assessment of plaintiff's land was not excessive nor out of line with the assessed values of other similar properties in the immediate area. He also testified that, based on a comparison of sales prices of four similar properties in the county, the market value of

plaintiff's property was more than double the assessed value for 1980.

The District Court found that the plaintiff had failed to establish that the action of the board of equalization was unreasonable or arbitrary, and affirmed the action of the board in valuing plaintiff's property for taxation for 1980.

In an appeal from property tax valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. *Riha Farms, Inc. v. County of Sarpy,* 212 Neb. 385, 322 N.W.2d 797 (1982).

There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Once there is competent evidence on appeal to the contrary, the presumption disappears and the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence. *Hastings Building Co. v. Board of Equalization,* 212 Neb. 847, 326 N.W.2d 670 (1982).

In the case at bar the plaintiff makes no contention that her lands have been valued for taxation at more than their actual value. The plaintiff failed to meet the burden of proving that the value of her property was not fairly and proportionately equalized, or that the valuation placed upon her property for tax purposes was unreasonable or arbitrary.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

CLINTON, J., not participating.

Cite as 213 Neb. 491

TERRY J. FLAKUS AND MARY V. FLAKUS, HUSBAND AND WIFE, APPELLEES, V. STEVEN L. SCHUG AND BARBARA SCHUG, HUSBAND AND WIFE, APPELLANTS.

329 N.W.2d 859

Filed February 11, 1983. No. 81-822.

1. **Evidence: Verdicts: Appeal and Error.** All conflicts in the evidence and questions of the credibility of witnesses are for the jury to resolve; a jury verdict may not be set aside unless it is clearly wrong.
2. **Trial: Directed Verdict.** When, upon a jury trial, a defendant at the conclusion of all the evidence moves for a directed verdict in his favor or for dismissal, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to plaintiffs, and plaintiffs are entitled to the benefit of all proper inferences which can reasonably be deduced therefrom.
3. **Contracts: Fraud.** The essential elements required to sustain an action for damages as the result of fraud are that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else was made recklessly; that the misrepresentation was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and that such party did, in fact, rely upon the misrepresentation and was induced thereby to act to his injury or damage.
4. _____: _____. A disclaimer clause is relevant in determining whether a claimant relied on the false representation disclaimed in the clause; however, the disclaimer is ineffective to preclude the trier of fact from considering whether fraud induced formation of the bargain.
5. **Vendor and Vendee: Fraud.** As between a vendor and a purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud; however, where such facts are known to the vendor and he knows them to be not within the reach of the attention, observation, and judgment of a reasonably diligent purchaser, and they are such as would readily mislead the purchaser as to the true condition of the property, the vendor is bound to disclose such facts.
6. **Fraud.** One may make a misrepresentation by conduct as well as by spoken words.
7. **Contracts: Fraud: Damages.** Generally, where there has been a misrepresentation in the sale of real estate, the measure of damages is the cost of placing the property conveyed in the condition represented, not exceeding the difference in value of the property conveyed and the value of the property if it had been as represented.

8. **Verdicts: Appeal and Error.** When a party has sustained the burden and expense of trial and has succeeded in securing the decision of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
9. **Appeal and Error.** Consideration of assignments of error in this court is limited to those discussed in the brief.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Denzel R. Busick of Luebs, Dowding, Beltzer, Leininger & Smith, for appellants.

William A. Francis of Cunningham, Blackburn, Vonseggern, Livingston, Francis & Riley, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

CAPORALE, J.

The sellers of residential real estate, Mr. and Mrs. Steven L. Schug, defendants in the trial court, appeal from the $3,500 judgment entered pursuant to a jury verdict in favor of the purchasers and plaintiffs-appellees, Mr. and Mrs. Terry J. Flakus. We affirm.

The sellers contend, in summary, that the trial court erred in (1) failing to sustain their motions for directed verdict after the close of the evidence; (2) admitting certain evidence with respect to cause and damages; and (3) improperly charging the jury with respect to the elements of fraud and the measure of damages.

The purchasers' amended petition alleges that the sellers "fraudulantly [sic] represented to Plaintiffs that the lot and house in question was [sic] free from underground water problems and that they [sellers] had not experienced water problems in the basement of the home." The amended petition alleges the other elements of a cause of action for contractual or promissory fraud, and prays for damages. The sellers deny the operative allegations of

the purchasers' amended petition, and allege that the sale was based upon the purchasers' own investigation and not upon any representations made by the sellers.

A jury verdict may not be set aside unless it is clearly wrong, and all conflicts in the evidence and questions of the credibility of witnesses are for the jury to resolve. *Diesel Service, Inc. v. Accessory Sales, Inc.,* 210 Neb. 797, 317 N.W.2d 719 (1982); *Kniesche v. Thos,* 203 Neb. 852, 280 N.W.2d 907 (1979). Moreover, when, upon a jury trial, a defendant at the conclusion of all the evidence moves for a directed verdict in his favor or for dismissal, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to plaintiffs, and plaintiffs are entitled to the benefit of all proper inferences which can reasonably be deduced therefrom. *Popken v. Farmers Mutual Home Ins. Co.,* 180 Neb. 250, 142 N.W.2d 309 (1966). Tested in accordance with these rules, the salient facts are that the purchasers inspected the premises in question prior to executing an offer to purchase on June 10, 1979. During these inspections the purchaser Mr. Flakus observed a sump pump in the basement furnace and laundry room and a sand point well in a basement storage room. A sand point well is used both to lower the water table and as a source of water. However, the basement had been finished into a living area, and a sump hole located in a walk-in closet under the basement stairs and a sump hole in another closet had been concealed prior to the purchasers' inspections. The offer to purchase was accepted by the sellers on June 19, 1979, following which the purchasers moved into the home. They experienced damaging water in the basement in April of 1980 and again during a tornado in June of 1980. One of the concealed sump holes was discovered by the purchasers after the April occurrence and the other following the June occurrence.

The essential elements required to sustain an action for damages as the result of fraud are that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else was made recklessly; that the misrepresentation was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and that such party did, in fact, rely upon the misrepresentation and was induced thereby to act to his injury or damage. *Gitschel v. Sauer,* 212 Neb. 454, 323 N.W.2d 93 (1982); *Hauck v. Samus,* 212 Neb. 25, 321 N.W.2d 68 (1982); *Erftmier v. Eickhoff,* 210 Neb. 726, 316 N.W.2d 754 (1982); *Luscher v. Empkey,* 206 Neb. 572, 293 N.W.2d 866 (1980).

The contract executed by the parties contains a clause which provides: "This offer is based upon my personal inspection or investigation of the premises and not upon any representation or warranties of condition by the Seller or his agent." Based upon our language in *Camfield v. Olsen,* 183 Neb. 739, 164 N.W.2d 431 (1969), the sellers argue that in view of the disclaimer described above, the purchasers could not have justifiably relied upon any representation which the sellers may have made. The sellers are in error in this regard. *Camfield* was a suit to foreclose the buyers' equity of redemption under an installment sales contract for the purchase of a motel. In a cross-petition for damages the buyers alleged the contract had been induced by false representations. The agreement recited, among other things, the number of times the buyers had stayed at the motel; that the buyers had seen a newspaper article reporting a flooding of the motel; that the sellers had informed the buyers the motel had flooded on two previous occasions; and that the sellers had instructed the buyers on how they thought the motel could be cleaned if another flood should occur. The agreement also stated the buyers had personally and fully inspected the motel. It is

true that in discussing the elements of fraud we said a disclaimer clause is relevant in determining whether a claimant relied on a false representation disclaimed in the clause. We also said, however, that the disclaimer is ineffective to preclude the trier of fact from considering whether fraud induced formation of the bargain. We also made the same observations in the later case of *Abbott v. Abbott,* 188 Neb. 61, 195 N.W.2d 204 (1972).

A more recent case dealing with fraud with respect to the sale of real estate is *Hauck v. Samus, supra.* We ruled therein that the seller of real property is not guilty of fraud as the result of a failure to disclose material, latent defects which are unknown to him. However, where the evidence shows that he was aware of circumstances from which a reasonable inference could be drawn that he either knew or should have been aware of the fact that latent, defective conditions existed, then he is liable to the purchaser. See, also, *Gitschel v. Sauer, supra; Dargue v. Chaput,* 166 Neb. 69, 88 N.W.2d 148 (1958). The latter was an action to rescind a contract for the purchase of residential property because of fraud by misrepresentation and concealment of certain facts relating to the condition of the property. *Dargue* holds that as between a vendor and a purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud; however, where such facts are known to the vendor and he knows them to be not within the reach of the attention, observation, and judgment of the purchaser, and they are such as would readily mislead a reasonably diligent purchaser as to the true condition of the property, the vendor is bound to disclose such facts. One may make a misrepresentation by conduct as well as by spoken words. See *Haarberg v. Schneider,* 174 Neb. 334, 117 N.W.2d 796 (1962), holding that the set-

ting back of an odometer, leaving the manufacturer's suggested retail list price attached to rear window, and inserting the word "new" in the invoice presented a jury question on the issue of fraud, notwithstanding that the seller did not say to the purchaser the car was new and made no statement as to the number of miles the car had been driven. Therefore, under the evidence in this case the jury could have found that the concealment of the two sump holes constituted a misrepresentation by conduct as to a material, latent defect known to the sellers.

The sellers argue, however, that the plaintiff did not plead a misrepresentation by conduct or concealment but, rather, pled oral misrepresentations. It appears the sellers read *Dargue* to make some distinction between the legal theories of misrepresentation by words and misrepresentation by concealment or conduct. Accordingly, the sellers urge the trial court erred in instructing the jury concerning fraudulent concealment. We disagree, since we neither understand *Dargue* to make such a distinction nor do we perceive any such distinction to exist.

The phrase "fraudulantly [sic] represented to Plaintiffs that the lot and house in question was [sic] free from underground water problems" in the purchasers' amended petition may well have been subject to a motion to make more definite and certain. However, no such motion was filed, and the language is sufficiently broad to admit evidence concerning concealment of the sump holes. In view of the fact that evidence concerning the concealed sump holes was properly admissible, there is evidence concerning the element of a reasonable reliance upon the misrepresentations by concealment or conduct sufficient to support the trial court's instruction concerning fraudulent concealment.

We now move on to a consideration of the proper measure of damages. Generally, where there has

been a misrepresentation in the sale of real estate, the measure of damages is the cost of repair, not exceeding the difference between the value of the property conveyed and the value of the property if it had been as represented. *Fink v. Denbeck,* 206 Neb. 462, 293 N.W.2d 398 (1980). The later case of *Bibow v. Gerrard,* 209 Neb. 10, 306 N.W.2d 148 (1981), does not refer to the need for comparing the cost of repair to the diminished value because the misrepresentation related only to the number of acres involved. Obviously, in such a situation there is no cost of repair. Indeed, perhaps a clearer statement of the rule is that where there has been a misrepresentation in the sale of real estate, the measure of damages is the cost of placing the property conveyed in the condition represented, not exceeding the difference in value of the property conveyed and the value of the property if it had been as represented. The trial court gave the following instruction: "The measure of damages is the difference in value between the property purchased if it had been as represented and its actual value." The instruction is, as claimed by the sellers, erroneous because it does not limit the recovery to the lesser of the diminished value or the cost of repair.

The question becomes, however, whether the error is prejudicial, for when a party has sustained the burden and expense of trial and has succeeded in securing the decision of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *Sortino v. Paynter,* 206 Neb. 348, 292 N.W.2d 916 (1980). We must therefore look to the evidence in order to determine whether the error was prejudicial to the sellers.

The purchaser Mr. Flakus testified that in his opinion the property conveyed was worth $10,000 less than if it had been as represented. Mr. Woodrow Nelson, a construction supervisor and estimator with at least 3 years' experience in construction, in

essence testified that although he could not guarantee that installation of a drain tile system would solve the problem, such a system could be tried as a solution. The cost of installation would be $3,458. Although evidence concerning the cause of the need to replace certain items and the predamage value of such and other items is lacking, the record does, nonetheless, contain competent evidence as to the cost of $1,018 for repairing the water-damaged drywall and floor tile. It is clear, therefore, that the court's erroneous instruction on the measure of damages did not prejudice the sellers.

We note the sellers assert the trial court erred in allowing a "nonexpert to state an opinion as to the cause of the water Plaintiffs allegedly experienced . . . ." That claimed error, however, is not discussed in sellers' brief. Since consideration of assignments of error in this court is limited to those discussed in the briefs, we do not address the question. See, Neb. Ct. R. 9D(1)d (Rev. 1982); Neb. Rev. Stat. § 25-1919 (Reissue 1979); *Cockle v. Cockle,* 204 Neb. 88, 281 N.W.2d 392 (1979); *State v. Beckner,* 211 Neb. 442, 318 N.W.2d 889 (1982).

For the reasons discussed above, we conclude that each of the sellers' assignments of error is without merit and, accordingly, affirm the trial court's judgment on the verdict.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID JOSEPH LAMB, APPELLANT.

330 N.W.2d 462

Filed February 11, 1983. No. 81-851.

1. **Miranda Rights.** Interrogation occurs when the subject is placed under a compulsion to speak.
2. **Miranda Rights: Confessions.** Generally, statements made in a conversation initiated by the accused are not the results of interrogation and are admissible.

3. **Motions to Suppress: Appeal and Error.** Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong.
4. **Confessions.** Intoxication is not conclusive on the issue of the voluntariness of a statement.
5. **Confessions: Appeal and Error.** A determination by the trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong.
6. **Convictions: Appeal and Error.** A conviction will not be reversed because of the admission of evidence not prejudicial to the defendant.
7. **Confessions: Right to Counsel.** Spontaneous statements made by the defendant, even after counsel has been requested, if not induced by the police or if made during conversations not initiated by the officers, are not "interrogation." The defendant must be subjected to "interrogation" in order for the right to counsel to come into play.
8. **Right to Counsel: Waiver.** The failure of the police to notify counsel, even if aware of such representation, does not violate the defendant's sixth amendment rights to the presence of counsel when the right has been waived voluntarily.
9. **Jury Instructions.** It is the duty of the trial court to instruct the jury on the law of the case whether requested to do so or not. Failure to do so constitutes prejudicial error.
10. _____. Alleged errors in instructions which are not prejudicial to the complaining party are not grounds for reversal of a judgment otherwise correct.
11. **Homicide: Mental Competency.** In order to prove the requisite mental state for murder in the first degree, the State is required to show a condition of the mind which was manifested by intentionally doing a wrongful act without just cause or excuse and which is defined as any willful or corrupt intention of the mind.
12. **Criminal Law: Mental Competency.** The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act.
13. **Criminal Law: Insanity.** Insanity as a defense must be shown to exist at the time of the offense.
14. **Criminal Law: Mental Competency.** The fact that a defendant had some form of mental illness or defect does not by itself establish lack of responsibility.
15. **Appeal and Error.** Generally, consideration of a cause in this court is limited to errors assigned and discussed.
16. **Homicide: Photographs.** In a homicide case photographs of the victim are admissible, even if gruesome, if a proper foundation is laid and they are received for purposes of identification, to show the condition of the body, the nature and extent of the wounds, and to establish malice or intent.

17. **Jurors.** A juror who has indicated an inability to fairly and impartially determine guilt may be excused for cause.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie, for appellant.

Paul L. Douglas, Attorney General, and Mel Kammerlohr, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

BOSLAUGH, J.

The defendant appeals from his conviction for first degree murder and sentence to life imprisonment. The defendant has assigned as error the denial of his motion to suppress and the subsequent admission into evidence of the challenged testimony; the "death qualification" of the jury; the admission into evidence of a photograph of the victim; and the giving of an instruction on the defense of intoxication. The defendant has also assigned as error that the verdict was contrary to the evidence and the law and that the finding by the sentencing panel that an aggravating circumstance existed was erroneous.

On July 14, 1980, the defendant shot and killed his wife, Dell Lamb, at their trailer home in Lincoln, Nebraska. After shooting his wife the defendant shot and killed their two dogs. The defendant had been drinking and had purchased the rifle used in the shooting earlier that day. At about 5:22 in the evening, the defendant called the long-distance operator, who referred the call to the Lincoln police dispatcher. The defendant stated that he had shot and killed his wife. When the police arrived at the home, Mrs. Lamb was dead. The defendant was then taken into custody.

At the arraignment on the charge of first degree murder, the defendant stood mute and a plea of not guilty was entered. Later the plea was changed to

not guilty by reason of insanity, and then to not responsible by reason of insanity. After a lengthy trial the jury returned a verdict of guilty of first degree murder. Following conviction, a sentencing panel imposed a sentence of life imprisonment.

The assignment of error concerning the ruling on the pretrial motion to suppress is directed primarily at three statements made to the police by the defendant after his arrest. The first statement was made shortly after the defendant arrived at the police station. Defendant had been taken to the station in a police cruiser driven by Officer Shurtleff. During the ride the defendant made remarks about the temperature of the car and told Shurtleff that he "was sick of seeing his wife suffer." At the station the defendant was placed in a holding room until a detective could be found to interview him. While in this room, the defendant told Shurtleff that he had shot his wife and was going to shoot himself but decided to drink some whiskey first. A few moments later the defendant said to Shurtleff, "How would you like it?" Shurtleff replied, "What do you mean by that?" The defendant answered, "I have to do the cooking, washing, the laundry. And I got tired of it, and I got tired of seeing her suffer so I shot her." Shurtleff testified that he was concerned about whether the defendant was uncomfortable, ill, or angry at being placed in that particular holding room. At the time, no *Miranda* warnings had been given to the defendant and Shurtleff had not posed any other questions to the defendant.

The defendant contends that the statement made in response to the question "What do you mean by that?" should have been suppressed, as it was the result of an unconstitutional custodial interrogation. The defendant contends that before any custodial interrogation by police can take place, the rule of *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), requires that the defendant be apprised of his right against self-incrimination and

of his right to the assistance of counsel. The defendant argues that interrogation occurs either through express questioning or its "functional equivalent," which is defined as police words or actions known by police to be reasonably likely to elicit an incriminating response. *Rhode Island v. Innis,* 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

In ruling on the motion to suppress, the trial court found that the statement was not made as a result of interrogation, but rather as the result of a "neutral," "spontaneous" question, not designed to elicit a confession.

The issue presented is whether this question constituted interrogation within the purview of *Miranda* and *Innis.* This court has determined that interrogation occurs when the subject is placed under a compulsion to speak. *In re Interest of Durand,* 206 Neb. 415, 293 N.W.2d 383 (1980). Statements made in a conversation initiated by the accused or spontaneously volunteered by the accused are not the result of interrogation and are admissible. *State v. Pittman,* 210 Neb. 117, 313 N.W.2d 252 (1981); *State v. Red Feather,* 205 Neb. 734, 289 N.W.2d 768 (1980).

A number of cases have held that this type of question does not amount to interrogation. In *Leslie v. Wainwright,* 511 F. Supp. 753 (M.D. Fla. 1981), the court, in a footnote, stated that a police officer's excited utterance to defendant, "What did you say?" did not constitute improper interrogation. In *Com. v. Shepherd,* 269 Pa. Super. 291, 409 A.2d 894, 896 (1979), the court said: "Where there is no expectation of an admission and the police conduct is not an attempt to obtain an admission, there is no interrogation." In *State v. Link,* 289 N.W.2d 102 (Minn. 1979), it was held that questions which had "nothing to do with investigative criminal activity" were not proscribed by *Miranda.* In *United States v. Pauldino,* 487 F.2d 127 (10th Cir. 1973), *cert. denied* 415 U.S. 981, 94 S. Ct. 1572, 39 L. Ed. 2d 878 (1974),

defendant was arrested for auto theft. He volunteered that he had a bill of sale. When asked by police if he had it, defendant replied he did not. The police question was held not to be a violation of *Miranda,* as it was a course of inquiry related and responsive to a volunteered remark. In *Johnson v. State,* 269 Ind. 370, 377, 380 N.E.2d 1236, 1240 (1978), the court stated: "Not every statement uttered by a police officer which is punctuated with a question mark will necessarily constitute an interrogation. . . . Rather, it is necessary to view the statement in the context in which it was made." In the *Johnson* case the officer's remark "What happened?" was held to be more in the nature of a greeting intended for its calming effect than for obtaining an admission, and thus the responsive statement was a spontaneous, voluntary, and unsolicited remark. See, also, *United States v. Voice,* 627 F.2d 138 (8th Cir. 1980).

Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong. A totality of the circumstances test is used. *State v. Strickland,* 209 Neb. 133, 306 N.W.2d 600 (1981); *State v. Sutton,* 207 Neb. 778, 301 N.W.2d 335 (1981). The record supports the trial court's conclusion that the question was a neutral and spontaneous one, not calculated to obtain a confession. Furthermore, the question did not place defendant under a compulsion to speak. The defendant had initiated the conversation, and the officer simply requested clarification. The finding of the trial court was not clearly wrong.

The second statement was made by the defendant to Lieutenant Wilkins, a police detective, on the evening of the day of the shooting. The defendant was given the *Miranda* warnings before the interview began. Detective Wilkins testified that the defendant, at that time, waived his rights freely and voluntarily. In the statement, the defendant admitted that he shot his wife and dogs. The defendant argues that the testimony of Lieutenant Wilkins

and the statement itself should have been suppressed under the rule expressed in *Blackburn v. Alabama,* 361 U.S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960), *Malloy v. Hogan,* 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), and *Lego v. Twomey,* 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972), because the defendant was in such a state of intoxication that he could not make a voluntary and intelligent waiver of his rights. A blood alcohol test taken approximately 10 minutes after the interview was completed revealed that the defendant's blood alcohol level was then .224 percent. The trial court found that the statements had been made freely, voluntarily, and intelligently.

Intoxication is not conclusive on the issue of voluntariness. In *State v. Laffoon,* 125 Ariz. 484, 487, 610 P.2d 1045, 1048 (1980), the Arizona Supreme Court stated: "The mere fact of intoxication does not render a statement inadmissible. The defendant must be so intoxicated that he is unable to understand the meaning of his statements. . . . If the trial judge is satisfied that under the totality of the circumstances the defendant was able to reason, comprehend, or resist, the statements are to be admitted." In *Mallott v. State,* 608 P.2d 737 (Alaska 1980), it was held that a blood alcohol reading of .31 did not render the defendant's statements inadmissible, as the investigator testified that defendant's responses to questioning were adequate. In *People v. Pawlicke,* 62 Ill. App. 3d 791, 796-97, 379 N.E.2d 798, 801 (1978), it was held that "The fact that the defendant may have consumed two bottles of strawberry wine . . . that she had taken four Librium tablets, that she felt depressed and was contemplating suicide; that her intelligence was 'dull'; and that her attention was focused on the deceased and her emotional relationship with the deceased does not require a conclusion that her subsequent statements were involuntary." See, also, *Rowe v. State,* 41 Md. App. 641, 398 A.2d 485 (1979), and *State v. Kelly,* 376

A.2d 840 (Me. 1977), wherein it was held that statements will be suppressed as involuntary only where it can be shown that defendant was not aware and able to comprehend and communicate with coherence and rationality. See, also, *State v. Rogers,* 208 Neb. 464, 303 N.W.2d 788 (1981).

A determination by the trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong. *State v. Sutton, supra; State v. McNitt,* 207 Neb. 296, 298 N.W.2d 465 (1980); *State v. Williams,* 205 Neb. 56, 287 N.W.2d 18 (1979), *cert. denied* 449 U.S. 891, 101 S. Ct. 255, 66 L. Ed. 2d 120 (1980). A totality of the circumstances test is used. *State v. Teater,* 209 Neb. 127, 306 N.W.2d 596 (1981).

Although there is some conflict in the evidence, the record supports the trial court's finding. Those who encountered defendant early in the day testified that he appeared to know what he was doing. Each police officer who came into contact with defendant following his arrest testified that he was capable of making voluntary and intelligent responses. Defendant answered the operator's questions coherently. His answers to the detective's questions were responsive.

It should be noted that the admission of the statements made to Shurtleff and Wilkins did not prejudice defendant. The defendant had made several voluntary and admissible confessions of guilt throughout the day. A conviction will not be reversed because of the admission of evidence not prejudicial to the defendant. *State v. Brehmer,* 211 Neb. 29, 317 N.W.2d 885 (1982); *State v. Packett,* 206 Neb. 548, 294 N.W.2d 605 (1980); *State v. Smith,* 209 Neb. 505, 308 N.W.2d 820 (1981).

The third statement was made by the defendant to Detectives Rowe and VanButsel about a week after the shooting. The defendant had requested a meeting with the officers. At the meeting the defendant requested that $30 he had on his person at the time

of his arrest be returned to him. No additional *Miranda* warnings were given during the meeting, but *Miranda* warnings had been given to the defendant on at least three separate prior occasions and each time the defendant had waived his rights.

Counsel had been appointed for the defendant at the time this meeting took place. The defendant argues that the information received by police as the result of this meeting should have been suppressed because the sixth amendment to the U.S. Constitution, as interpreted in *Massiah v. United States,* 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), and *Brewer v. Williams,* 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977), requires the presence of counsel at such an interrogation. It is the defendant's position that he should have had an opportunity to request counsel. The trial court ruled that the statements were volunteered by defendant and were not the result of questioning. The statement regarding the money was admitted as relevant to defendant's mental state and his memory of the events on the day of the shooting.

In order for the right to counsel to come into play, the defendant must be subjected to "interrogation." Spontaneous statements made by the defendant, even after counsel has been requested, if not induced by the police or if made during conversations not initiated by the officers, are not "interrogation." *State v. Pittman,* 210 Neb. 117, 313 N.W.2d 252 (1981). "When an accused initiates the conversation, his statements do not result from 'interrogation' and are admissible." *United States v. Perkins,* 608 F.2d 1064, 1068 (5th Cir. 1979). Further, the fact that the defendant initiated the conversation is a circumstance from which it can be inferred that the right to an attorney was waived. *Id.* The failure of the police to notify counsel, even if aware of such representation, does not violate the defendant's sixth amendment rights to the presence of counsel when the right has been waived voluntarily. *State v.*

Jackson, 205 Neb. 806, 290 N.W.2d 458 (1980).

Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong. *State v. Strickland,* 209 Neb. 133, 306 N.W.2d 600 (1981). By requesting the meeting and initiating the conversation regarding the money, the defendant waived his right to counsel voluntarily. The record supports this finding.

The defendant next contends that it was erroneous for the trial court to instruct the jury on the defense of intoxication, over his objection. The defendant argues that this violated the attorney-client privilege and denied him due process of law.

It is the duty of the trial court to instruct the jury on the law of the case whether requested to do so or not. Failure to do so constitutes prejudicial error. *State v. Duis,* 207 Neb. 851, 301 N.W.2d 587 (1981); *Herman v. Midland Ag Service, Inc.,* 200 Neb. 356, 264 N.W.2d 161 (1978). See, also, *State v. Thomas,* 262 N.W.2d 607, 612 (Iowa 1978): "Even without a request, the court must instruct fully on all material issues, stating applicable legal principles supported by requisite evidence"; *State v. Miller,* 120 Ariz. 224, 226, 585 P.2d 244, 246 (1978): "In matters of a fundamental nature, the trial judge is required to instruct the jury on his own motion, even if not requested by the defense, and failure to instruct the jury on a matter vital to the rights of the defendant creates fundamental error"; *People v. Olguin,* 119 Cal. App. 3d 39, 173 Cal. Rptr. 663, 667 (1981): "Even in the absence of a request, the court is under an affirmative duty to give an instruction on defendant's theory of defense where ' ". . . it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense . . . ." ' . . . Moreover, . . . the trial court had a *sua sponte* duty to instruct on these principles pursuant to its obligation to instruct as to the general principles of law even where no such instruction is re-

quested." The defendant would have the trial court ignore this duty.

The factual foundation for the instruction on intoxication is amply supported by the record and, if believed by the jury, would have permitted a finding of guilt of a lesser-included offense. It had some bearing on the mental state of the defendant at the time of the shooting. The defendant has shown no prejudice resulting from the inclusion of this defense along with the insanity defense. Alleged errors in instructions which are not prejudicial to the complaining party are not grounds for reversal of a judgment otherwise correct. *Snyder v. Fort Kearney Hotel Co., Inc.,* 185 Neb. 476, 176 N.W.2d 686 (1970).

Defendant next contends that the verdict was not supported by the evidence and was contrary to law. A jury verdict of guilty will not be overturned on appeal unless it is so lacking in probative force that it can be said as a matter of law the evidence is insufficient to support it. *State v. Thaden,* 210 Neb. 622, 316 N.W.2d 317 (1982); *State v. True,* 210 Neb. 701, 316 N.W.2d 623 (1982).

The statute which was in effect at the time of the crime provided: "A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice . . . ." Neb. Rev. Stat. § 28-303 (Reissue 1979).

There was no dispute about the fact of the killing. In order to prove the requisite mental state, the State was required to show a condition of the mind which was manifested by intentionally doing a wrongful act without just cause or excuse and which is defined as any willful or corrupt intention of the mind. *State v. Johnson,* 200 Neb. 760, 266 N.W.2d 193 (1978).

Defendant relied on the defense of not responsible by reason of insanity. " 'The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the

ability to distinguish between right and wrong with respect to the act.' " *State v. Simants,* 197 Neb. 549, 570, 250 N.W.2d 881, 893 (1977), *cert. denied* 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158, *rehearing denied* 434 U.S. 961, 98 S. Ct. 496, 54 L. Ed. 2d 322. Insanity as a defense must be shown to exist at the time of the offense. *State v. Newson,* 183 Neb. 750, 164 N.W.2d 211 (1969). See *State v. Bolton,* 210 Neb. 694, 316 N.W.2d 619 (1982). Defendant argues that his mental functions were impaired because of his long history of alcohol abuse, and his relationship with his wife had become a source of great depression for him because she was chronically ill and was becoming an increasing burden on him. He argues these things prevented him from forming the requisite mental state at the time of the killing.

The record amply supports the verdict of the jury. The defendant admitted that as early as 1975 he thought about shooting his wife and dogs. On the day of the shooting the defendant fabricated stories regarding the rifle he purchased. He told the clerk at the hardware store the rifle was for a nephew. Upon arriving home he told his wife he had found the gun. He stated to the police detective, "I will convict myself if I say that, but I will tell you anyway. I bought a rifle." The evidence shows the defendant was aware of the wrongful quality of his intended acts.

All of the stories given by the defendant regarding the incident were consistent. The police officers and the other witnesses who were in contact with defendant on that day testified that he seemed to know what he was doing. He recalled how much money he had at the time of his arrest. The record shows the defendant knew what he was doing and was able to recall his actions.

Although there were conflicts in the expert testimony, the evidence of the State was that the defendant was not "insane" at the time of the offense within the legal definition of that term. One of the wit-

nesses called by the defendant refused to give an opinion regarding the defendant's mental state at the time of the act. The witnesses generally did not find the defendant to be suffering from an extreme and debilitating form of mental illness. The fact that a defendant had some form of mental illness or defect does not by itself establish lack of responsibility. *State v. Simants, supra.*

The defendant next assigns as error the admission over objection of a photograph of the victim's head showing the bullet wounds and the resulting blood. The defendant objected to the exhibit on the basis of foundation and that its prejudicial effect outweighed its probative value.

This assignment of error was not discussed in the brief. Generally, consideration of a cause in this court is limited to errors assigned and discussed. *State v. Stranghoener,* 208 Neb. 598, 304 N.W.2d 679 (1981).

In a homicide case photographs of the victim are admissible, even if gruesome, if a proper foundation is laid and they are received for purposes of identification, to show the condition of the body, the nature and extent of the wounds, and to establish malice or intent. *State v. Rowe,* 210 Neb. 419, 315 N.W.2d 250 (1982). These requirements were met in this case.

Another error assigned but not discussed was the finding by the sentencing panel that "The murder was especially heinous, atrocious, cruel or manifested exceptional depravity by ordinary standards of morality and intelligence." See Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1979).

There was evidence that the defendant shot the victim twice in the head at close range while she was lying on a davenport. Although the wounds rendered the victim unconscious, she did not die immediately. The time of the shooting was not fixed precisely, but it may have been 1 or 2 hours before the telephone call at 5:22 p.m. As the sentencing panel found, "Defendant killed his wife without just

cause or excuse. The murder of Dell Lamb was planned, callous, cold-blooded and involved cruel disregard for human life. The killing was totally and senselessly bereft of any regard for human life. Under the circumstances of this murder, the murder was especially atrocious, cruel and manifested exceptional depravity by ordinary standards of morality and intelligence."

In any event, the finding that the aggravating circumstance existed was not prejudicial to the defendant. The finding would be of importance only if a death sentence had been imposed. Neb. Rev. Stat. §§ 29-2519 et seq. (Reissue 1979). The sentence of life imprisonment which was imposed in this case was fully justified by the record and was not an abuse of discretion.

The defendant's final assignment of error contends the trial court erred in permitting "death qualification" of the jury. Defendant's motion to prohibit asking the jury panel, on voir dire, questions relative to their feeling on the death penalty was overruled. The court stated, in overruling the motion, that such questions would be permitted within the scope of *Lockett v. Ohio,* 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). Defendant had argued that such voir dire would result in a "prosecution prone" jury, as those who were strongly opposed to the death penalty would be excused from the jury through the State's use of its challenges. Defendant argued that such a jury would be more likely to convict.

In *Lockett, supra,* the prosecution asked the panel whether any of the jurors were so opposed to capital punishment that they could not make their determination of guilt based solely upon the evidence and the law. The court asked those who responded affirmatively whether their opposition to the death penalty was of such strength that it would prohibit them from taking the oath. Four veniremen responded affirmatively to both inquiries and were

excused. As in Nebraska, a jury in Ohio does not make the sentencing decision in capital cases.

The Court held such voir dire proper as "[e]ach of the excluded veniremen in this case made it 'unmistakably clear' that they could not be trusted to 'abide by existing law' and 'to follow conscientiously the instructions' of the trial judge. . . . They were thus properly excluded under *Witherspoon,* even assuming, *arguendo,* that *Witherspoon* provides a basis for attacking the conviction as well as the sentence in a capital case." 438 U.S. at 596.

In *Witherspoon v. Illinois,* 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), *rehearing denied* 393 U.S. 898, 89 S. Ct. 67, 21 L. Ed. 2d 186, the Court held that without concrete evidence to support the "prosecution prone" theory, a *conviction* will not be overturned simply because of a "death-qualifying" voir dire. However, the Court held that where the sentencing function is entrusted to the jury, excluding all jurors opposed to the death penalty falls "woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." 391 U.S. at 518.

In *State v. Anderson and Hochstein,* 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981), this court dealt with the issue of "death qualification" of the jury. Relying upon the decision in *Witherspoon, supra,* we held that that decision does not preclude exclusion of a juror who has indicated an inability to fairly and impartially determine guilt. In *State v. Kirby,* 185 Neb. 240, 249, 175 N.W.2d 87, 93 (1970), this court stated, "One who cannot subordinate his personal views to what he perceives to be his duty to abide by his oath as a juror and to obey the law of the state must be excused for cause."

In the present case the court asked the jury panel: "This is a case of murder in the first degree. . . . And one of the possible penalties is the death penalty. The Judge makes the final decision in the

case in the event of conviction, and with the punishment you have absolutely nothing to do with it. The question is whether or not any of you have conscientious scruples against the death penalty." The record does not reflect any responses of the jury. The defendant does not contend that any juror was excluded as a result of this question.

The question asked by the trial court was of the type permitted in the cases cited, as it was directed at whether the jurors would be able to render a verdict upon an impartial consideration of the evidence and the law. The defendant has not demonstrated by concrete evidence that the jury was conviction prone. Additionally, the sentencing of the defendant did not rest with the jury.

As a final consideration, since defendant was not sentenced to death, he has not demonstrated prejudice either in regard to his conviction or his sentence. In the absence of prejudice, a conviction otherwise correct will not be overturned. *State v. Brehmer,* 211 Neb. 29, 317 N.W.2d 885 (1982); *State v. Packett,* 206 Neb. 548, 294 N.W.2d 605 (1980).

There being no error, the judgment is affirmed.

AFFIRMED.

CLINTON, J., not participating.

TERRY SMITH CARADORI, APPELLEE AND CROSS-APPELLANT, V. FRONTIER AIRLINES, INC., APPELLANT AND CROSS-APPELLEE.

329 N.W.2d 865

Filed February 11, 1983. No. 82-208.

1. **Workmen's Compensation: Appeal and Error.** It is well settled that findings of fact made by the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and, if supported by sufficient evidence, will not be disturbed on appeal unless clearly wrong.
2. **Workmen's Compensation: Proof.** The burden of proof is upon the plaintiff to prove an accident arising out of and in the course

of his employment and the disability resulting therefrom. Plaintiff must show a causal connection between the accident suffered by him and the alleged disability.

3. _____: _____. Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability.
4. **Workmen's Compensation.** An award of compensation may not be based on possibilities or speculative evidence.

Appeal from the Nebraska Workmen's Compensation Court. Reversed and remanded with directions to dismiss.

Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Spencer W. Dillon, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

WHITE, J.

Appellee resided in Omaha, Nebraska, from January of 1978 until September of 1978. From September of 1978 until June of 1979 she resided in Denver, and in June of 1979 she returned to Omaha. On February 8, 1979, appellee was a flight attendant for Frontier Airlines, Inc., with her employment base of operations in Denver, Colorado. She was working on a Frontier Airlines flight from Denver to Kansas City, Missouri, when the plane suddenly veered and she fell off balance and received the back injury complained of. The appellee has a previous history of back injury, the most worthy of note being a 1978 incident. The Workmen's Compensation Court made an award and the employer appeals.

A number of issues are raised by appellant: (1) The scope of the jurisdiction of the Workmen's

Compensation Court under Neb. Rev. Stat. § 48-115(2)(b) (Reissue 1978); (2) If we find that the compensation court had jurisdiction, whether an action based on these same facts filed in another state requires the Nebraska action to be abated, or stayed; (3) Whether the acceptance of benefits under the Colorado workmen's compensation law precluded recovery under Nebraska law; and (4) Whether the compensation court erred in finding that Caradori's disability arose out of and in the course of her employment by Frontier Airlines, Inc.

In view of our decision in this case, we will discuss only the fourth assignment of error.

It is well settled that findings of fact made by the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and, if supported by sufficient evidence, will not be disturbed on appeal unless clearly wrong. *Renshaw v. Merrigol-Adler Bakery,* 212 Neb. 662, 325 N.W.2d 46 (1982).

Essentially, the question which arises in this case is the same one which has with increasing frequency arisen in other compensation court appeals, namely, whether there has been sufficient proof of medical causation to establish that the disability is the result of an accident arising out of as well as in the course of employment. The medical evidence establishes that Caradori suffers from the effects of a cervical sprain with attendant pain and suffers a disability which the compensation court determined to be 10 percent of the body as a whole.

The testimony offered by Caradori relating to causation is by Dr. Louis Tribulato, an orthopedist, as follows: "Q. Regarding the history that she gave you of the two injuries, do you feel that these, her current condition, could have been caused by those injuries? A. Yes. MR. ZINC: Obtain [sic] as no proper and sufficient foundation. Go ahead. BY MR. DILLON: Q. And would you state this

conclusion based upon your skill, training and experience and with reasonable medical certainty? A. Yes."

Dr. John Goldner, a neurologist, testified that, with reasonable medical certainty, a cervical nerve impingement *could* have been caused by the first or second accident.

None of the physicians, whether testifying for Frontier Airlines or Caradori, stated that, in their opinion, Caradori's disability *was* the result of an accident arising out of as well as in the course of employment.

This is a difficult case. Whether by accident or design, counsel omitted asking expert medical opinion on causation. We are not free to retry cases on appeal, or to speculate on the answers treating physicians might have given to questions not asked.

Neb. Rev. Stat. § 48-101 (Reissue 1978) provides in part that "When personal injury is caused to an employee *by accident* or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor . . . ." (Emphasis supplied.)

In *Smith v. Stevens,* 173 Neb. 723, 725-26, 114 N.W.2d 724, 726 (1962), this court stated that "The burden of proof is upon the plaintiff to prove an accident arising out of and in the course of his employment and the disability resulting therefrom. Plaintiff must show a causal connection between the accident suffered by him and the alleged disability." Although the *Smith* decision was rendered under a de novo review and not the present clearly erroneous standard, its logic remains applicable to the facts in the present case.

Also, in *Mack v. Dale Electronics, Inc.,* 209 Neb. 367, 370, 307 N.W.2d 814, 816 (1981), we said: " 'Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled profes-

sional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries.' The employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability."

An award of compensation may not be based on possibilities or speculative evidence. *Welke v. City of Ainsworth,* 179 Neb. 496, 138 N.W.2d 808 (1965). Thus, the mere possibility that a disability arose out of and in the course of employment does not satisfy the claimant's burden of proof.

The claimant, Caradori, having only proved that the disability could have been caused by an accident arising out of and in the course of employment has not sustained her burden of proof. The award must be reversed and the cause remanded with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

JAMES D. HILL AND KENNETH L. IDEEN, IN PERSON AND FOR ALL PERSONS SIMILARLY SITUATED, APPELLANTS, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

330 N.W.2d 471

Filed February 18, 1983. No. 81-669.

1. **Statutes.** Legislative definitions of terms used to adequately express the purpose of a particular legislative act do not change the common meaning of words used in matters disconnected therewith, unless the same are adopted by reference.
2. _____. Where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning, and in the absence of anything to indicate the contrary, words will be given their ordinary meaning.
3. _____. A sensible construction will be placed upon a statute to effectuate the object of legislation, rather than a literal meaning that would have the effect of defeating the legislative intent.

4. _____. Whether words are ambiguous is a question of law for the court.
5. **Pensions: Words and Phrases.** The meaning of the words "salary," as used in Neb. Rev. Stat. § 15-1007.01 (Cum. Supp. 1982), and "regular pay," as employed in § 15-1001 (Cum. Supp. 1982), are the same and include only basic pay without consideration of extra compensation for overtime, college credits, holiday service, etc.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded.

J. Murry Shaeffer of Shaeffer Law Offices, P.C., for appellants.

William F. Austin, City Attorney, and William G. Blake, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The plaintiffs, James D. Hill and Kenneth L. Ideen, brought this class action on behalf of all presently employed Lincoln police officers and firefighters. In their petition they challenged the withholding of certain amounts from police officers' and firefighters' pay as contributions to their pension fund. The District Court found these deductions taken to be appropriate under the relevant statutes, and dismissed the amended petition. From this action the plaintiffs have appealed, contending generally that the trial court erred in finding that the word "salary" had no clear definition in public employee pension law and in determining that the city's interpretation of the word "salary" was a practical interpretation of the statute.

The facts are not in dispute. All police officers and firefighters are entitled to a basic pay based on job classification and experience, according to a "schedule of pay ranges" set by ordinance. This pay plan is based on a 40-hour week for police officers and a 56-hour week for firefighters. In addition, such employees are paid various amounts for

overtime, college credits, and holiday service, as the case may be.

The pension plan for cities of the primary class, which includes the City of Lincoln, was established in its present form in 1963. Neb. Rev. Stat. §§ 15-1001 et seq. (Reissue 1977). It provides that 7 percent of each employee's "salary" shall be contributed to the pension fund (§ 15-1007.01 (Cum. Supp. 1982)), and upon retirement or otherwise qualifying for pension benefits under the plan, each individual shall be paid benefits of 54 percent of the "regular pay" of such individual (§ 15-1001 (Cum. Supp. 1982)). The term "regular pay" is defined in § 15-1001.01(1) (Cum. Supp. 1982) as follows: "Regular pay shall mean the average pay of a firefighter or police officer for the three years preceding the date such firefighter or police officer elects to retire or his or her death, whichever is earlier."

According to the testimony of the retired finance director of the City of Lincoln, it had been the practice in administering the pension plan to deduct 7 percent of each officer's or firefighter's "total gross pay," including base pay, overtime pay, college pay, and all other supplements to base pay. In turn, benefits were computed on the basis of 54 percent of the yearly average of this same "total gross pay" over the last 3 years preceding retirement or death.

It is the contention of the plaintiffs that the statutory term "salary" means only "basic pay," whereas the term "regular pay" includes "basic pay" and also all extra compensation for overtime, holiday service, college credits, etc. In other words, they insist that deductions are to be based on the lesser pay and benefits on the greater. By this action the plaintiffs seek the return of any contributions taken in excess of 7 percent of regular, basic pay, i.e., those deductions taken from overtime pay, holiday pay, college pay, etc., for the 4-year period immediately preceding the filing of their petition. Any claim to deductions taken prior to that 4-year

period would be barred by the statute of limitations. Unfortunately, that date does not appear in the record presented to us and will have to be determined on remand of the case as hereinafter ordered.

The City of Lincoln has always taken the position that both terms mean the same, and it has consistently withheld contributions on the "total gross pay" and paid benefits on the same basis.

The District Court found that the term "salary" is unclear, or, in other words, ambiguous, and permitted parol evidence in an effort to construe the terms of the statute. Testifying in addition to the finance director and the two plaintiffs were an actuary dealing specifically in pension plans, the personnel administrator of the City of Lincoln, and a member of his department.

The two "experts," the actuary and the personnel administrator, testified generally that the word "salary" has no definite or static meaning when used in plans such as the one under consideration. In addition, the finance director, whose duty it was to administer the pension plan, interpreted the law to require that contributions and benefits both be made on "total gross pay."

The plaintiffs contend that in defining "salary" under §§ 15-1001 et seq., we are controlled by the definition of such word as contained in the pension plan for firefighters of cities of the *first class*, Neb. Rev. Stat. §§ 35-201 et seq. (Cum. Supp. 1982). Section 35-203.01 provides that such firefighters shall contribute an amount "equal to five per cent of his or her salary." Section 35-206 requires that "such pension shall be at least fifty per cent of the amount of salary such retiring firefighter is receiving at the time he or she goes upon such pension list." Finally, under the terms of § 35-201(5), "salary shall mean the base rate of pay, excluding overtime, callback pay, clothing allowances, and other such benefits." The plaintiffs thus argue that because "salary" is defined for cities of the first class as base pay only

for purposes of both contributions and benefits, cities of the primary class must follow the same definition where the word "salary" is used for the purpose of determining contributions. However, urge the plaintiffs, when it comes to benefits, the phrase "regular pay," because it is defined as "average pay . . . for . . . three years" means total gross pay, i.e., basic, overtime, holiday, college, etc.

We do not agree that we are so limited. Although the Legislature often feels compelled to define terms used to adequately express the purpose of a particular legislative act, such definitions do not change the common meaning of words used in matters disconnected therewith, unless the same are adopted by reference. *Moffitt v. State Automobile Ins. Ass'n*, 140 Neb. 578, 300 N.W. 837 (1941).

Of necessity, we must be guided by several well-defined rules in our examination and construction of this statutory scheme. Where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning, and in the absence of anything to indicate the contrary, words will be given their ordinary meaning. *County of Douglas v. Board of Regents,* 210 Neb. 573, 316 N.W.2d 62 (1982). A sensible construction will be placed upon a statute to effectuate the object of legislation, rather than a literal meaning that would have the effect of defeating the legislative intent. *PPG Industries Canada Ltd. v. Kreuscher,* 204 Neb. 220, 281 N.W.2d 762 (1979). Whether words are ambiguous is a question of law for the court. *R. A. Hanson Co. v. Aetna Ins. Co.,* 26 Wash. App. 290, 612 P.2d 456 (1980).

In *Halpin v. Nebraska State Patrolmen's Retirement System,* 211 Neb. 892, 320 N.W.2d 910 (1982), the meaning of the term "final average monthly salary" was at issue. However, that case was decided on other grounds and is of no help in solving the specific problem with which we are here presented.

The Random House Dictionary of the English Lan-

guage offers the following definitions of the key words involved: *salary* "a fixed compensation periodically paid to a person for regular work or services, esp. work other than that of a manual, mechanical, or menial kind . . . Syn. See pay"; *pay* ". . . 25. remuneration, emolument, fee, honorarium, income allowance. PAY, WAGE OR WAGES, SALARY, STIPEND, EARNINGS are terms for amounts of money or equivalent benefits, usually given at a *regular* rate or at *regular* intervals, in return for services" (emphasis supplied); *regular* "1. usual, normal, customary . . . 2. evenly or uniformly arranged . . . 3. characterized by fixed principle, uniform procedure, etc.: *regular income.*"

We conclude that the words are not ambiguous and that "salary," when used to determine the amount of contributions to be made by the employee, means regular, basic pay. By the same token, "regular pay," when used to ascertain the amount of benefits due, means regular, basic pay, modified only by the requirement that the figure shall be computed by a 3-year average, rather than employing the precise figure existing as of the date of computation of such benefits.

To include such items as overtime pay and holiday pay within the definition of "regular pay" would place the amount of an employee's retirement income as dependent upon the vagaries of the calendar or the occurrence of natural or manmade disasters. Additionally, it makes no sense at all to interpret this retirement program in such a way as to require contributions on the basis of a smaller figure and benefits on a larger one. As stated in *Policeman's and Fireman's Retirement Fund of City of Ashland v. Richardson,* 522 S.W.2d 452, 453 (Ky. App. 1975), "It is axiomatic that there is no such thing as 'free money.' " We cannot conclude that the Legislature intended such an absurd result as that contended for by the plaintiffs.

The judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CLINTON, J., not participating.

WHITE, J., concurring.

Briefs were filed and this case was at issue prior to the announcement of our decision in *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982). Also at issue in that case was the meaning of the term "final average monthly salary." We held in *Halpin* that the manner of computing the pension was a contractual right as to persons employed before 1979 and the right to the pension computation was protected against unconstitutional impairment.

We do not have before us, as we did in *Halpin,* evidence with respect to representations made to prospective firemen and policemen of the City of Lincoln as to future pension benefits after completion of a required period of service, nor do we have before us evidence that such manner of computation of pension benefits was relied on by such employees in the hiring process, or in the negotiating process incident to collective bargaining. What we have done in this case is to merely interpret words. We do not decide the issues raised in *Halpin.* Those issues remain for another day.

JEROME PAPROCKI, APPELLEE, V. ALFRED STOPAK AND DOUGLAS STOPAK, APPELLANTS.

330 N.W.2d 475

Filed February 18, 1983. No. 81-727.

1. **Motor Vehicles: Negligence.** The negligence of a family-purpose driver is not ordinarily imputed to the family-purpose owner in an action by the owner against a third party for the owner's own injuries or property damage.

2. _____: _____. The owner of a family-purpose car may not recover from the driver of another car when the negligence of the family-purpose driver is the sole proximate cause of the collision.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Reversed and remanded.

Stephen C. Hansen of Luckey, Sipple & Hansen, for appellants.

Thomas M. Maul of Albert, Leininger & Grant, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

MCCOWN, J.

This is an automobile accident case involving property damage only. The case was commenced in the small claims court by the plaintiff owner of a car driven by his daughter against the driver and the joint owner of another car to recover damages to plaintiff's car. The defendants filed a counterclaim and cross-petition against the plaintiff for damages to their car. The small claims court entered judgment for $407.50 for the plaintiff on his petition, and also entered judgment against the plaintiff and for the defendants on their counterclaim in the sum of $950.

The plaintiff appealed to the District Court. The District Court affirmed the judgment for the plaintiff against both defendants on plaintiff's petition but found that the family-purpose doctrine was incorrectly applied by the small claims court in allowing judgment for defendants on their cross-petition, and denied the cross-petition. The defendants have appealed.

On January 13, 1981, an automobile owned by plaintiff and driven by plaintiff's daughter was in collision with an automobile owned by defendants Alfred Stopak and Douglas Stopak and driven by Douglas Stopak. The evidence is undisputed that

the car owned by plaintiff was generally used by his daughter for school purposes and other purposes and was, in general, a family-purpose automobile. Except for the fact that defendants were father and son, there was no evidence that defendants' car was a family-purpose automobile. The evidence at the trial in the small claims court was in dispute as to the lane of traffic in which the accident occurred and, consequently, the negligence or comparative negligence of each driver was also at issue.

The small claims court entered judgment for the plaintiff and against both defendants on plaintiff's petition for $407.50 and for the defendants on their counterclaim in the sum of $950, but made no finding as to the negligence, comparative negligence, or lack of negligence of either driver.

On appeal, the District Court found that the small claims court incorrectly interpreted the family-purpose doctrine in allowing defendants to recover on their cross-petition against plaintiff, found against the defendants on their cross-petition, and affirmed the judgment for the plaintiff on his petition. The District Court also failed to make any finding as to the respective negligence, comparative negligence, or lack of negligence of either driver.

The basic problem in this case is that under the family-purpose doctrine, the negligence of the driver of the family-purpose car is imputed to the parent owner in actions by third parties to recover for personal injuries or property damage proximately caused by the negligent acts of the family-purpose driver. However, the negligence of the family-purpose driver is not ordinarily imputed to the family-purpose owner in an action by the owner against a third party for the owner's own injuries or property damage. See *Bartek v. Glasers Provisions Co., Inc.*, 160 Neb. 794, 71 N.W.2d 466 (1955).

The underlying purpose of the family-purpose doctrine is to provide financial responsibility for the negligent acts of family members which cause dam-

age to third parties. Such a purpose is not present when the owner of a family-purpose car sues to recover his own damages caused, or jointly caused, by the negligence of third parties. See 2 Harper & James, Law of Torts § 23.6 (1956).

The plaintiff tacitly agrees, and the defendants vigorously contend, that the family-purpose doctrine was applicable to impute any negligence of plaintiff's daughter to plaintiff in connection with the defendants' counterclaim or cross-petition. Plaintiff argues, however, that the District Court's denial of defendants' counterclaim should be affirmed on the ground that it constituted a finding that the negligence of the plaintiff's daughter was slight in comparison to the defendant driver's negligence, or that plaintiff's daughter was guilty of no negligence whatever.

It is virtually impossible to tell from the record what the specific findings of negligence were. Neither is there evidence to impute the negligence of the defendant driver to the other defendant owner under the family-purpose doctrine in entering judgment on plaintiff's petition. The owner of a family-purpose car may not recover from the driver of another car when the negligence of the family-purpose driver is the sole proximate cause of the collision. *Pearson v. Schuler,* 172 Neb. 353, 109 N.W.2d 537 (1961).

Where there is no determination as to negligence, comparative negligence, or lack of negligence of either of the drivers, and the imputations of negligence under the petition operate differently than under the cross-petition, there are no specific factual findings upon which it can be properly determined whether either judgment may be affirmed or reversed.

The judgment on plaintiff's petition and the judgment on defendants' counterclaim and cross-petition are both vacated and the cause remanded to the District Court for determination and findings as to the

negligence and comparative negligence of the drivers and the imputation of such negligence to any of the parties, both as to the petition and cross-petition, and the entry of appropriate judgment or judgments on those findings in accordance with this opinion.

REVERSED AND REMANDED.

BOSLAUGH and HASTINGS, JJ., dissent.

CLINTON, J., not participating.

CHARLIE NEKUDA, JR., ALSO KNOWN AS NEKUDA FARM SUPPLY, APPELLEE, V. DAVID J. VINCENT, APPELLANT.

330 N.W.2d 477

Filed February 18, 1983. No. 81-764.

1. **Contracts: Damages.** If a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects.
2. _____: _____. If the defects cannot be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between its value as constructed and what its value would have been if built according to the contract.

Appeal from the District Court for Custer County: JAMES R. KELLY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Joseph E. Twidwell, for appellant.

Robert C. Guenzel of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

PER CURIAM.

This case arises out of a controversy concerning a contract for the construction of a metal grain storage building.

On August 17, 1977, the plaintiff and the defendant entered into a written contract in which the plaintiff agreed to furnish the labor and materials required to construct a 60-foot by 140-foot Butler "Farmsted" building. The building was to be equipped for grain storage and constructed on the defendant's farm for a total contract price of $40,234.45. The defendant paid 15 percent down by check dated October 4, 1977, with the balance due on completion. The contract did not provide for any completion date.

The building had been substantially completed by December 20, 1977, and in January 1978 the defendant placed approximately 22,000 bushels of corn in the building. On December 30, 1977, the plaintiff requested payment of the balance of the contract price so that he could include the amount in his income for the calendar year. Pursuant to an agreement between the parties, the defendant delivered his check in the amount of $34,199.70. On January 2, 1978, the plaintiff deposited the same amount in the defendant's bank account, thus refunding the payment made on December 30, 1977.

The defendant complained about snow blowing into the building and later about water leaking into the building. The defendant did not store additional grain in the building and eventually removed the corn that had been placed in the building in January 1978. The plaintiff made several attempts to repair the building but the defendant was not satisfied.

On August 11, 1978, the plaintiff commenced this action to recover the balance due on the contract. The defendant's answer alleged the plaintiff had orally agreed to complete the building by October 10, 1977; that the defendant was required to store corn upon the ground because the building had not been completed by November 30, 1977, the date on which the defendant completed his harvest; and that the building was defective and not suitable for grain storage and was of no use to the defendant. The defendant counterclaimed for loss of rental on the

building; damage to grain; expense of moving and drying grain, including equipment purchased to salvage the grain; insurance purchased on the building; loss of profits; and the downpayment.

The trial court found generally for the plaintiff; that the plaintiff had substantially completed the contract; that the tender of a check for the balance due on the contract by the defendant was "an agreement by the Defendant that the contract had been substantially performed"; and that the plaintiff was entitled to recover $34,199.70, with interest and costs, from the defendant.

Both parties filed motions for new trial, which were overruled. The defendant has appealed.

The assignments of error in substance allege that the evidence does not support the judgment and there was a breach of a warranty of merchantability in regard to the materials supplied under the contract.

As we view the record, the Uniform Commercial Code has no application in this case. The parties contracted for the construction of a building upon the defendant's land. The plaintiff was obligated to furnish labor and materials. The contract was not a contract for the sale of "goods." In any event, the defendant's complaints relate not to the materials supplied but to the manner in which the building was assembled and to the delay in completion of the work.

The evidence does support a finding of substantial performance but not upon the basis of the check delivered to the plaintiff by the defendant on December 30, 1977. The evidence is undisputed that the payment was for the convenience of the plaintiff and was not intended to be a payment of the balance due on the contract. In accordance with the understanding between the parties, the payment was refunded to the defendant by the plaintiff on January 2, 1978.

The defendant intended to pay for the building by obtaining a loan through the ASCS. The building

was inspected by the county executive director for the ASCS on February 9, 1978, and approved. The loan was approved and the proceeds disbursed to the defendant shortly thereafter.

The defendant's principal complaint relates to his claim of snow blowing into the building and water leaking into the building. The evidence is that the snow entered the building because of an open space under the eaves of the building. Apparently, this was a part of the design of the building for the purpose of ventilation. After the defendant complained about this feature the plaintiff closed the openings.

The evidence indicates that water entered the building because the caulking between some panels was defective or not properly installed, and some bolts or screws were improperly installed. The evidence does not disclose what would be required to remedy this defect, although it does disclose that the defect may be corrected.

If a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects. *Jones v. Elliott,* 172 Neb. 96, 108 N.W.2d 742 (1961). However, if the defects cannot be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between its value as constructed and what its value would have been if built according to the contract. *Id.*

The finding that there had been substantial performance of the contract by the plaintiff is sustained by the record. The evidence, however, does establish that the defendant is entitled to damages resulting from defective caulking and defective installation of bolts and screws. He is not entitled to consequential damages in view of the general finding by the trial court for the plaintiff which finds support in the record.

The cause is remanded to the District Court for

further proceedings to ascertain the damages due the defendant for defective caulking and defective installation of bolts and screws in the building.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CAPORALE, J., dissenting in part.

I must, for the reasons stated in *LeRoy Weyant & Sons, Inc. v. Harvey,* 212 Neb. 65, 321 N.W.2d 429 (1982), dissent from that portion of the majority opinion which remands the counterclaim for further proceedings. The majority opinion herein correctly states the rule as to the defendant-counterclaimant's measure of damages. It fails to make clear, however, that Mr. Vincent's theory of damages was that the building should be dismantled and removed. Accordingly, none of his evidence was directed to the proper measure of recovery.

Mr. Vincent's expert testified the building can be "rehabilitated" and outlined ways in which that might be done, but there is no evidence concerning the cost of doing so. We have held that one seeking to recover in a breach of contract action must not only show his right to recover but must also show the elements and facts which comprise the measure of his recovery. *Midlands Transp. Co. v. Apple Lines, Inc.,* 188 Neb. 435, 197 N.W.2d 646 (1972). It is true that in *Smith v. Erftmier*, 210 Neb. 486, 315 N.W.2d 445 (1982), a case involving an improperly constructed grain bin, we allowed the owner to recover damages in the absence of evidence concerning the difference in the value of the bin as constructed compared to its value had it been properly constructed. The distinction is that in *Smith v. Erftmier* the owner did adduce evidence of the cost of repair. It was the builder who claimed the building could not be repaired and who failed to offer evidence to support his claim in that regard. More recently, in *"L" Investments, Ltd. v. Lynch,* 212 Neb. 319, 322 N.W.2d 651 (1982), a case involving negligent

damage to an improvement on realty, we placed upon the party seeking recovery the burden of proving the cost of repair, and upon the party against whom recovery is sought, the burden, if he so believes, of proving that such cost exceeds the market value of the property before the damage. One seeking to recover damages because of an improperly constructed building, therefore, has the burden of proving the cost of making it conform to the state in which it should have been constructed; the party against whom recovery is sought, if he so believes, has the burden to establish that such cost exceeds the difference in value between the building as constructed compared to its value if it were to have been constructed properly. Mr. Vincent's failure to prove the cost of repair is fatal; his counterclaim should be dismissed.

WHITE, J., and MORAN, D.J., join in this dissent.

IN RE FREEHOLDER PETITION.
RONALD L. JANZEN ET AL., APPELLEES, V. DEAN G. NORQUEST ET AL., APPELLANTS.

330 N.W.2d 481

Filed February 18, 1983. No. 81-883.

1. **Schools and School Districts: Appeal and Error.** The action of the board under Neb. Rev. Stat. § 79-403 (Reissue 1981) is an exercise of a quasi-judicial power, equitable in character, and upon appeal from the District Court to this court the cause is triable de novo as in any other equitable action.
2. **Schools and School Districts.** A freeholder petition must be supported by an adequate showing that the purposed transfer of land is justified in relation to the controlling educational factors regarding the convenience, necessity, or welfare of the pupil or pupils involved. Such a showing must include a demonstration of significant differences in the class, accreditation, leadership, management, curricula, and/or efficiency of the schools involved.
3. **Witnesses: Rules of Evidence.** A parent as an informed and concerned lay person is competent to testify as to his or her opinion on "best educative interest." The parents were not testifying as

experts, and the evidence was clearly admissible under Neb. Rev. Stat. § 27-701 (Reissue 1979).

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed.

John F. Recknor of Barlow, Johnson, DeMars & Flodman, for appellants.

John R. Brogan of Brogan, McCluskey & Wolstenholm, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

WHITE, J.

This is an appeal from a District Court judgment reversing a decision of a freeholder board which denied transfer of petitioners' land from school district No. 83 of York and Fillmore Counties (hereafter McCool Junction School District) to school district No. 95 of York, Fillmore, and Hamilton Counties (hereafter Henderson School District). This matter arose under Neb. Rev. Stat. § 79-403 (Reissue 1981) before it was amended. The District Court held that the best educative interest of Andrew Scott Janzen, son of the petitioners, would be served if the transfer was granted.

The appellants-objectors, residents of McCool Junction School District, urge as error in this court (1) the finding of the District Court that petitioners had sustained the burden of proof that the transfer was in the best educative interest of Andrew Scott Janzen; (2) the ruling of the District Court that expert testimony is not required to demonstrate best educative interest; and (3) the ruling of the District Court which allowed the parents of Andrew Scott Janzen to testify as to the best educative interest of their son.

The review of a decision of the District Court granting or denying a freehold transfer is de novo in this court, and this court will come to an independent conclusion, having due regard to the superior po-

sition of the trier of facts who had an opportunity to see and hear the witnesses and to form a judgment on their credibility. *Klecan v. Schmal,* 196 Neb. 100, 241 N.W.2d 529 (1976).

The sole issue in freehold transfer cases is the best educative interest of the child. "Whether or not the transfer of land requested is to the advantage or the disadvantage of the school districts involved is not the deciding issue." *Friesen v. Clark,* 192 Neb. 227, 233, 220 N.W.2d 12, 16 (1974).

In *Friesen* we stated that a freeholder petition "must be supported by an adequate showing that the purposed transfer of land is justified in relation to the controlling educational factors regarding the convenience, necessity, or welfare of the pupil or pupils involved. Such a showing must include a demonstration of significant differences in the class, accreditation, leadership, management, curricula, and/or efficiency of the schools involved." *Id.* at 231, 220 N.W.2d at 15. In *Friesen* the transfer involved the identical districts here involved. Indeed, the evidence presented in this case is strikingly similar to that presented in that case.

Ronald L. and Joyce E. Janzen, the petitioners and appellees, owned land in the McCool Junction School District and applied to the board for transfer to the Henderson School District. Their son, Andrew, was a kindergartner at time of trial. The petitioners, in addition to their own testimony, offered the evidence of Ronald Pauls, elementary school principal at Henderson, and Allen Friesen, superintendent of schools at Henderson. Norman Bonde, superintendent of schools at McCool Junction, was the only witness for appellants.

Mr. Pauls testified that he had been the elementary school principal at Henderson for 13 years; that he had a bachelor of arts degree in elementary education, a master of education degree, and a specialist degree in educational administration, and that the curriculum for a child from kindergarten

through the sixth grade consisted of reading, mathematics, science, social studies, health, handwriting, and spelling. The elementary faculty included two teachers with master's degrees and two with at least 36 hours of graduate work. Teaching equipment included instructional television sets, projectors and viewers, record players, and a computer. The student-teacher ratio was approximately 15 to 1; in addition to a regular classroom teacher for each grade, the elementary staff consisted of an elementary music teacher, an instrumental music teacher, an art teacher, a resource teacher, and teacher aides.

Allen Friesen testified that Henderson was a Class III district; that the enrollment was 190 in the elementary school and 150 in the secondary school; and that the schools were located on a 12-acre tract not intersected by streets. He further testified that of the 32 teachers on the staff, all had at least a bachelor's degree, 14 had master's degrees, and 3 had at least 36 hours above the bachelor's degree requirements. The elementary and secondary principals had no classroom responsibilities. All teachers participated in a continuing in-service program to improve skills. The main building at Henderson had been built in 1953, with additions in 1959 and 1974. The Henderson School District offered a vocational agriculture program, a science laboratory, a physics and chemistry laboratory, and a biology laboratory. Henderson School District also offered a shop program, a full mathematics program, and a 3-year program in German.

Ronald L. Janzen testified that from their farm home it was approximately 6 miles to the Henderson school and 8 miles to the McCool Junction school. Mr. Janzen also testified that he had taken the vocational agriculture course at Henderson and felt that his son should take the course. Both Ronald and Joyce Janzen testified that, in their opinion, the best

educative interest of their son would be served by the transfer.

Norman Bonde, superintendent of schools at McCool Junction, testified for the appellants. He testified that he had a master's degree and a specialist in administration from Kearney State College; that no foreign language was offered at the McCool Junction school; that three members of the faculty were not endorsed in certain of the classes they were teaching, including chemistry and physics, eighth and ninth grade science, and seventh and eighth grade English; that the driver's education teacher had a provisional endorsement; and that vocational education courses are not offered at McCool Junction and had not been offered in the past.

The appellants do not attempt to distinguish the facts of this case from *Friesen v. Clark, supra.* In that case we granted a freehold transfer from McCool Junction to Henderson. We noted there the argument that while vocational agriculture was not then offered it might well be offered in the future. Nine years later the same argument is offered here. The argument did not convince the court then; it does not do so now. On the facts as proven, the District Court was correct.

Under our de novo review, we agree with the conclusion reached by the trial court.

However, we must deal with the assignments of error relating to the quality of proof in determining "best educative interest." Without citing other than the most general authority, appellants assert that "best educative interest" must be relegated to the experts, that no determination can be made without a complete testing procedure of the student, and only after that testing is complete may an appropriate interpreter of that testing state an opinion of "best educative interest." This view is not supported by our cases and we decline to adopt it. While such evidence, if offered, would appear to be

relevant, its absence will not doom the petition to failure.

Nor are we convinced that a parent as an informed and concerned lay person is not competent to testify as to his or her opinion on "best educative interest." The parents were not testifying as experts, and the evidence was clearly admissible under Neb. Rev. Stat. § 27-701 (Reissue 1979) as that "rationally based on the perception of the witness and . . . helpful to a clear understanding of his testimony or the determination of a fact in issue."

The decision of the trial court is correct and is affirmed.

AFFIRMED.

STEWART W. KLEEB, APPELLEE AND CROSS-APPELLANT, V. ALLENE D. KLEEB, WILMA A. ASKEY, ARDEN L. ASKEY, VELMA JEZBERA, and FRANK JEZBERA, APPELLEES, KENNETH LAURITZEN, APPELLANT AND CROSS-APPELLEE.

330 N.W.2d 484

Filed February 18, 1983. No. 82-385.

Supersedeas Bonds. As a rule, a supersedeas or stay does not reverse, annul, or undo what has already been done, or impair the force or pass on the merits of the judgment, order, or decision of the trial court; and the judgment, order, or decree is not vacated or annulled, nor is its validity or effect impaired thereby.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Reversed and remanded with directions.

Jim R. Titus of Peterson, Bowman & Johanns, for appellant.

Ronald D. Svoboda and David V. Chebatoris of Clements, Svoboda & Chebatoris, for appellee Stewart Kleeb.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

KRIVOSHA, C.J.

This is the second appearance of this case before this court. Originally, this case was before us concerning the question of whether a partition action was properly conducted. The facts of the case are reported in our earlier opinion and may be found at 210 Neb. 637, 316 N.W.2d 583 (1982). This appeal concerns itself with the question as to who should be entitled to the landlord's share of the crops earned for the years 1980 and 1981 while the case was on appeal. Having now reviewed the record, we believe that the trial court should not have awarded the crops to the original owners and we therefore reverse the judgment.

On June 6, 1980, the trial court confirmed the judicial sale in question and ordered the property conveyed to the purchaser, Kenneth P. Lauritzen (purchaser). Owners Wilma E. Askey and Arden L. Askey (Askeys) filed a notice of appeal and what purports to be a supersedeas bond. Additional owners, Stewart W. Kleeb, Allene D. Kleeb, Velma Jezbera, and Frank Jezbera, did not join in the appeal, but all, including the Askeys, will be referred to herein as "original owners."

During the pendency of the appeal the referee properly leased the real estate for farming on a sharecrop arrangement, resulting in net rental income from the property for the years 1980 and 1981. Following our affirmance in the first case on February 26, 1982, the trial court entered an order which provided in part that the original owners were to pay the real estate taxes for the years 1980 and 1981 and were therefore to receive the landlord's share of the crops for the years 1980 and 1981. The trial court also ordered that the interest earned on the downpayment held by the referee during the time of appeal should be paid to the purchaser. Because the question of interest on the unpaid balance was not presented to the trial court, it made no finding in that regard. Lauritzen assigns as error the

trial court's awarding of the landlord's share of the crops to the original owners. Although the original owners did not initially seek interest on the unpaid balance, appellee Stewart Kleeb now asserts for the first time in this court, by way of cross-appeal, that they should be entitled to interest on the unpaid balance of the purchase price.

In order to determine whether the action of the trial court was correct, we must resolve two questions. The first question is, What was the status of the case just before the appeal was taken? The second question is, What was the effect of the filing of the supersedeas bond by the Askeys?

With regard to the first question, the answer is relatively simple. Absent the filing of a notice of appeal, the purchaser in this case would have been entitled to the crops for the years 1980 and 1981 and would have been obligated to pay the expenses, including the real estate taxes. The sale bill contracted for that result. In advertising the sale, the referee provided in part as follows: "POSSESSION: Buyer takes full possession of mineral rights and buyer takes owner's interest in 1980 crops at the time balance is paid. Seller to pay 1979 ($1,214.03) and all prior real estate taxes. Purchaser pays 1980 taxes." Regardless of what the law may be as to the appropriate division between buyer and seller at a judicial sale where nothing is said, the parties in this case contracted, as they were entitled to do, as to how the crops and expenses were to be handled. In judicial sales the court is the vendor, *State Bank of Nebraska v. Green,* 8 Neb. 297, 1 N.W. 210 (1879), and generally may set such terms not otherwise unlawful. Without regard to when the sale was to take place or the confirmation obtained or the deed conveyed, the purchaser was to pay the taxes for the year 1980 and, presumably then, for all subsequent years, and was likewise to receive the crops for the year 1980 and, presumably, all subsequent years. Absent the filing of a notice of appeal and, more

importantly, absent the giving of a purported supersedeas bond, there would be no question as to how this case should be resolved.

What then was the effect of the giving of the supersedeas bond by the Askeys? Did the giving of the bond in effect set aside the judgment entered by the trial court on June 6, 1980, or did it merely suspend the enforcement of the judgment until we affirmed the trial court's action on February 26, 1982?

On June 6, 1980, after notice and hearing, the trial court specifically confirmed the sale to the purchaser and ordered the referee to convey said premises to the purchaser by deed. On June 6, 1980, the purchaser became the equitable owner of the property, *Lamb v. Sherman,* 19 Neb. 681, 28 N.W. 319 (1886); *Yeazel v. White,* 40 Neb. 432, 58 N.W. 1020 (1894), and, pursuant to the court's order and the previous representation made by the referee in the sale notice, became entitled to the 1980 crops and was obligated to pay the 1980 taxes. We think it clear from both a reading of the statute providing for the giving of a supersedeas bond, Neb. Rev. Stat. § 25-1916 (Reissue 1979), and our previous holdings that the giving of the supersedeas bond does not set aside a previous order of the court but merely suspends its enforcement.

In *Guaranty Fund Commission v. Teichmeier,* 119 Neb. 387, 391, 229 N.W. 121, 123 (1930), we noted: "The general rule is that the effect of a supersedeas bond is to suspend proceedings and preserve the *status quo* pending the determination of the appeal. It suspends all further proceedings on the judgment or decree appealed from, but does not, like a reversal of the judgment by this court, annul the judgment itself." And in 4A C.J.S. *Appeal and Error* § 662 at 497 (1957), the author notes: "As a rule, a supersedeas or stay does not reverse, annul, or undo what has already been done, or impair the force, or pass on the merits, of the judgment, order, or decision of the trial court; and in most jurisdictions the

judgment, order, or decree is not vacated or annulled, nor is its validity or effect impaired thereby." We are such a jurisdiction. To hold otherwise would be to totally ignore the function of a supersedeas bond. Were we to take the position urged upon us by the appellee Stewart Kleeb, one could appeal such a case, file a supersedeas bond and, after the crops had been raised and harvested, dismiss the appeal without liability and contrary to the clear language of the sale bill. The filing of the supersedeas bond in this case did not reverse the order of the trial court entered on June 6, 1980, nor did it affect the commitment made by the parties in the sale bill. As a matter of fact, our opinion filed in this case on February 26, 1982, did not confirm the sale, as urged by appellee Stewart Kleeb, but, rather, affirmed "the order of the District Court confirming the sale to appellee Lauritzen and ordering the referee to convey the premises to him . . . ." All that our decision did was to affirm what the trial court had already done and remove the stay which was preventing the referee from acting in accordance with the previous order of the trial court. The trial court therefore should have directed that the landlord's share of the crops earned for the years 1980 and 1981 be paid to the purchaser and that the purchaser likewise be obligated to pay the landlord's share of the expenses, including the payment of real estate taxes incurred for the years 1980 and 1981. For the same reasons, it follows that the interest earned on the downpayment must be paid to the referee for distribution to the original owners.

That leaves us with the final question of whether the purchaser herein should be required to pay interest on the balance of the purchase price from the date of confirmation to the present. Unfortunately, the original owners did not raise that issue before the trial court and did not afford the trial court the opportunity to pass upon it. More importantly, how-

ever, the parties offered no evidence on this question. The general rule in regard to this matter is fairly clear, as expressed by our decision in the case of *McCleneghan v. Powell,* 105 Neb. 306, 312, 180 N.W. 576, 579 (1920), wherein we said: "Equity will not permit a vendee to enjoy the rentals that are derived from land for which he has not paid and at the same time permit him to escape the payment of interest to the vendor on the unpaid purchase price unless a tender has been made of such purchase price and kept good." The only evidence concerning the tender is a stipulation entered into by all the parties to the effect that at all times relevant the purchaser was "ready and willing and able to pay the full amount of the purchase price." Obviously, his inability to pay was due to the fact that the Askeys had filed a supersedeas bond preventing the referee from executing and conveying a deed to Lauritzen, thereby requiring Lauritzen to make payment. The very terms of the sale gave to Lauritzen a choice of paying upon confirmation *or* when merchantable abstract and deed *were delivered.* The purchase price was not due and payable until the deed was delivered and that did not happen until after the mandate was issued by this court.

Appellee Stewart Kleeb argues that, this being an equitable action, we have reasonable discretion to allow or withhold interest as is reasonable and just under the circumstances. See *Patterson v. Spelts Lumber Co.,* 166 Neb. 692, 90 N.W.2d 283 (1958). The difficulty with that argument is that had the Askeys not superseded the judgment and prevented the payment of the balance, payment would have been forthcoming upon delivery of the deed. It was the Askeys' act which authorized Lauritzen to withhold payment. Likewise, we are totally without any evidence to determine whether purchaser was obligated to make any payments to anyone else during this time in order to keep the proceeds on reserve for payment when needed or whether he gained any

benefit by reason of the delay. One may surmise as to the facts, but it is difficult, if not impossible, to do equity absent evidence and based solely on surmise. We therefore find that the judgment of the trial court directing that the landlord's share of the crops for the years 1980 and 1981 be paid to the original owners, subject to their paying the real estate taxes for those years, should be reversed, and the proceeds instead should be ordered paid to the purchaser, subject to his paying the real estate taxes for the years in question. We likewise reverse that portion of the trial court's order directing that the interest on the downpayment be paid to the purchaser and direct that the interest be paid instead to the referee for distribution to the original owners. We make no order regarding the request that the purchaser be ordered to pay interest on the unpaid balance.

The judgment of the trial court is reversed and the cause remanded with directions to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., concurs in the result.

BOSLAUGH, J., dissenting.

The order of the trial court, while perhaps erroneous, was at least equitable. The majority opinion fails to do equity between the parties because it awards both the use of the unpaid purchase price and the income from the land to the purchaser.

From the time when a contract of sale of land should be performed the land is, in equity, the property of the vendee held by the vendor in trust for him, and the purchase price is the property of the vendor held in trust for him by the vendee. Upon specific performance the vendor is liable to account for the rents and profits and the vendee for the interest on the purchase price. *Russell v. Western Nebraska Rest Home, Inc.*, 180 Neb. 728, 144 N.W.2d 728 (1966).

In *McCleneghan v. Powell*, 105 Neb. 306, 180 N.W. 576 (1920), cited in the majority opinion, the vendor

recovered interest on the unpaid balance of the purchase price. That case does not support the result reached by the court in this case. Under the rule of the *McCleneghan* case, the purchaser in this case should be required to account to the owners for interest on the unpaid balance of the purchase price.

In the *McCleneghan* case we held that the vendor was entitled to interest on the unpaid balance of the purchase price because *the evidence of the vendee* failed to show that the vendee had either borrowed the money or held it unused for the benefit of the vendor. Because the evidence did not show that McCleneghan "had either borrowed or exclusively appropriated $20,000 and that the money was held continuously from March 1, 1918, unused and in readiness to be paid to the defendants Powell upon fulfilment of their part of the contract," the defendants Powell were entitled to interest at the lawful rate from March 1, 1918, until the date the money was paid into court. *Id.* at 312, 180 N.W. at 579.

A mere tender or offer to perform is not enough to excuse the vendee from accounting for interest on the unpaid balance of the purchase price during the delay in performance. The evidence must show that the money was "appropriated" to the contract and "no benefit has accrued" to the vendee from the unpaid money before the vendee can avoid accounting to the vendor for interest on the purchase price.

In this case the evidence falls far short of satisfying the rule of the *McCleneghan* case. The parties merely stipulated that the vendee "was ready and willing and able to pay the full amount of the purchase price." There is no showing that the vendee had borrowed the money and was paying interest on it, or had "appropriated" the money and derived no benefit from it.

If the income from the property is to be awarded to the purchaser, he should be required to account for interest on the unpaid balance of the purchase price.

McCown and Hastings, JJ., join in this dissent.

Cite as 213 Neb. 545

LORETTA L. ROTH AND JANE MONTGOMERY, APPELLEES, v. SCHOOL DISTRICT OF SCOTTSBLUFF, IN THE COUNTY OF SCOTTS BLUFF, IN THE STATE OF NEBRASKA, A POLITICAL SUBDIVISION, APPELLANT.

330 N.W.2d 488

Filed February 25, 1983. No. 81-702.

1. **Teacher Contracts.** A probationary teacher is entitled to none of the termination or rehiring benefits allowed under Neb. Rev. Stat. §§ 79-1254 et seq. (Reissue 1981), including the preferred rights to reemployment under § 79-1254.07.
2. **Constitutional Law: Statutes.** The constitutional requirement that statutory language must be reasonably certain or be held void for vagueness is satisfied by the use of ordinary terms which find adequate interpretation in common usage and understanding.
3. **Teacher Contracts: Words and Phrases.** "Reduction in force," within the meaning of Neb. Rev. Stat. § 79-1254.07 (Reissue 1981), has a clear meaning in common usage and means terminating a teacher "due to a surplus of staff."
4. **Teacher Contracts: Waiver.** The question of whether a person has waived a right to recall under Neb. Rev. Stat. § 79-1254.07 (Reissue 1981) is one of fact.
5. **Declaratory Judgments: Appeal and Error.** The determination of factual issues in a declaratory judgment action, which would otherwise be an action at law, will be treated in the same manner as if a jury had been waived, and hence a trial court's findings have the effect of a jury verdict and will not be set aside unless clearly wrong.
6. **Teacher Contracts: Damages: Appeal and Error.** The computing of damages and the finding that a teacher has properly mitigated damages under Neb. Rev. Stat. § 79-1254.07 (Reissue 1981) are factual issues, and the findings of the trial court in this regard will not be set aside unless clearly wrong.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed in part, and in part reversed and remanded with directions to dismiss.

True R. Ferguson of Atkins, Ferguson, Hahn, Zimmerman & Carney, for appellant.

Mark D. McGuire of Crosby, Guenzel, Davis, Kessner & Kuester, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The School District of Scottsbluff appeals a declaratory judgment action in which the District Court found plaintiffs, Loretta Roth and Jane Montgomery, were entitled to and deprived of preferred rights of reemployment under Neb. Rev. Stat. § 79-1254.07 (Reissue 1981), and awarded damages accordingly. On appeal, the School District of Scottsbluff contends the trial court erred in (1) allowing Montgomery preferred rights to reemployment under § 79-1254.07, (2) concluding § 79-1254.07 was constitutional, (3) finding Roth had not waived her right to reemployment, and (4) computing damages and finding plaintiffs properly mitigated damages. We reverse in respect to Montgomery and affirm in respect to Roth.

Roth and Montgomery were teachers for school district No. 67 when that district, in March 1979, adopted a plan to merge with the Scottsbluff School District. As a result of the merger, Scottsbluff School District assumed all rights and obligations of school district No. 67. Montgomery was a probationary teacher in her first year of teaching for school district No. 67 and Roth was a tenured teacher. In April 1979 Montgomery received notice that her contract would be terminated at the close of the contract period. Roth received notice that the merger would cause a reduction in staff and, consequently, her contract would be terminated at year-end. The school district No. 67 board affirmed both terminations after a board hearing.

In anticipation of the merger, plaintiffs interviewed with the Scottsbluff School District for teaching positions. After the interviews the Scottsbluff School District contacted neither plaintiff concerning reemployment and hired new teachers from 1979 to 1981 to satisfy positions for which Montgomery and Roth were qualified. Montgomery found a part-time teaching job for 1980-1981. Roth taught at Wheatland School District from 1979 to

1980 and at Berean Christian School from 1980 to 1981, with both positions paying less than if she had taught in the Scottsbluff School District.

Plaintiffs filed a declaratory judgment action on July 30, 1979, asking for damages based on their preferred right to reemployment under § 79-1254.07. At trial, the court found that both Montgomery, a probationary teacher, and Roth, a tenured teacher, were terminated due to a reduction in force and, consequently, had preferred rights to reemployment which the School District of Scottsbluff failed to respect.

In its first assignment of error Scottsbluff School District argues that a probationary teacher is not entitled to preferred rights to reemployment allowed under § 79-1254.07. Section 79-1254.07 states that "Any employee whose contract shall be terminated because of reduction in force . . . shall have preferred rights to reemployment for a period of twenty-four months commencing at the end of the contract year and the employee shall be recalled on the basis of length of service to the school to any position for which he or she is qualified by endorsement or college preparation to teach."

We have said that the purpose of the tenured teacher act, Neb. Rev. Stat. §§ 79-1248 to 79-1254.08 (Reissue 1981), " 'is to guarantee a tenured teacher continued employment except for two justifiable circumstances: (1) Discharge for cause; and (2) reduction in the teaching force.' " *Moser v. Board of Education,* 204 Neb. 561, 563, 283 N.W.2d 391, 393 (1979). In *Meyer v. Board of Education,* 208 Neb. 302, 303 N.W.2d 291 (1981), we stated that § 79-1254 provides proper procedures for termination of tenured teachers, but does not protect probationary teachers who may be terminated for any or no reason. "Probationary teachers are exempted from every provision outlined in § 79-1254 . . . ." *Id.* at 305, 303 N.W.2d at 293. Thus, based on *Meyer,* we find that a probationary teacher is entitled to none of

the termination or rehiring benefits allowed under §§ 79-1254 et seq., including the preferred rights to reemployment under § 79-1254.07. Consequently, the trial court erred in awarding Montgomery damages based on her preferred rights to reemployment, for as a probationary teacher, even one terminated due to a reduction in force, she has no reemployment rights under § 79-1254.07. Conversely, because Roth is a tenured teacher terminated due to a reduction in force, she has preferred rights to reemployment under § 79-1254.07.

In attacking Roth's award, the School District of Scottsbluff contends § 79-1254.07 is unconstitutional because the phrases "reduction in force," "waive recall," and "leave of absence," found in § 79-1254.07, are too vague to give one notice. We will not consider the phrase "leave of absence," as it is only a hypothetical problem in the present case. See *Horn v. Burns and Roe,* 536 F.2d 251 (8th Cir. 1976). The constitutional requirement that statutory language must be reasonably certain or be held void for vagueness is satisfied by the use of ordinary terms which find adequate interpretation in common usage and understanding. *State v. Metteer,* 203 Neb. 515, 279 N.W.2d 374 (1979). Based on this standard we find the statute adequately certain. "Reduction in force" has a clear meaning in common usage, and this court has further clarified its meaning by stating that reduction in force involves terminating a teacher "due to a surplus of staff." *Moser v. Board of Education, supra* at 564-65, 283 N.W.2d at 393. Similarly, "waive recall" is a phrase of common understanding, meaning relinquishing the right to be called back. See Webster's Third New International Dictionary, Unabridged (1968).

Next, the School District of Scottsbluff contends that the trial court erred in not finding that Roth waived her right to recall. Section 79-1254.07 states that "An employee under contract to another educational institution may waive recall . . . ."

Thus, the question is whether Roth voluntarily and intentionally relinquished her right to recall. See *Pester v. American Family Mut. Ins. Co.,* 186 Neb. 793, 186 N.W.2d 711 (1971). The waiver question is one of fact for the jury. 28 Am. Jur. 2d *Estoppel and Waiver* § 174 (1966); *Williams v. Stroh Plumbing & Electric, Inc.,* 250 Iowa 599, 94 N.W.2d 750 (1959). The determination of factual issues in a declaratory judgment action, which would otherwise be an action at law, will be treated in the same manner as if a jury had been waived. Hence, a trial court's findings have the effect of a jury verdict and will not be set aside unless clearly wrong. *MFA Ins. Companies v. Mendenhall,* 205 Neb. 430, 288 N.W.2d 270 (1980); *Larutan Corp. v. Magnolia Homes Manuf. Co.,* 190 Neb. 425, 209 N.W.2d 177 (1973).

We find the record supports the court's refusal to find Roth waived her right of recall. Indeed, her interviewing with the School District of Scottsbluff, her attorney's letters to the district concerning her rehiring, and her filing of this suit suggest a strong intent to maintain, rather than waive, her right of recall.

Finally, the School District of Scottsbluff argues that the trial court erred in computing damages and in finding Roth properly mitigated damages. Both of these are factual issues and the findings of the trial court will not be set aside unless clearly wrong. *MFA Ins. Companies v. Mendenhall, supra; Larutan Corp. v. Magnolia Homes Manuf. Co., supra.* We find that a reading of the record supports the trial court's findings on Roth's damages and her proper mitigation of damages.

The judgment of the District Court in favor of Montgomery is reversed and the cause remanded with directions to dismiss her action, and the judgment in favor of Roth is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

CLINTON, J., not participating.

IN RE ESTATE OF JEAN F. MCCARTNEY, DECEASED. KIRK MCCARTNEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF JEAN F. MCCARTNEY, DECEASED, APPELLANT, V. SHIRLI FRANK MCCARTNEY, APPELLEE.

330 N.W.2d 723

Filed February 25, 1983. No. 81-779.

1. **Marriage: Proof.** Marriage is a fact which may be proved by direct or circumstantial evidence, or by documentary or parol evidence. The weight and sufficiency of the evidence to prove marriage is governed by the general rules of evidence.
2. _____: _____. The general rule is that the burden of proof of marriage is upon the party who pleads it.
3. _____: _____. Where the issue is whether a marriage was ever contracted, the burden of proof is on the party asserting its existence.
4. _____: _____. Common-law marriages are not recognized in Nebraska. Cohabitation without a ceremonial marriage is meretricious and is not evidence of marital status in this state.
5. _____: _____. In order to prove a marriage there must be proof that a ceremonial marriage took place.
6. **Evidence: Witnesses.** Uncontroverted testimony need not be accepted as absolute verity, especially when that testimony is opposed to common knowledge or human experience, or is inherently improbable, unreasonable, or unworthy of belief.
7. _____: _____. The trier of fact has a right to test the credibility of a witness by his self-interest and to weigh undisputed testimony against facts and circumstances in evidence from which a conclusion can be drawn that the testimony is not true.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded.

Ray C. Simmons of Ray C. Simmons, P.C., for appellant.

Levy & Lazer, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

BOSLAUGH, J.

Jean F. McCartney died testate on June 1, 1980, a resident of Dodge County, Nebraska. His will, dated June 3, 1977, which devised his entire estate to his

children, Kirk McCartney and Susan Frye, was admitted to probate on August 15, 1980.

On October 10, 1980, Shirli Frank McCartney filed a petition for formal determination of heirship in the county court. The petition alleged that she was married to the deceased at the time of his death and entitled to a statutory share of his estate as an omitted spouse.

Both the petitioner and the deceased had been previously married and divorced. The deceased and his first wife, Lois, were divorced on April 6, 1977. The petitioner claims her marriage to the deceased took place in December 1977.

The county court found that the petitioner, Shirli Frank McCartney, had failed to prove a valid marriage. Upon appeal to the District Court that court found that a marriage had been shown and the personal representative had failed to prove that it was invalid. The personal representative has appealed to this court.

The issue presented by the appeal is whether the petitioner and the deceased were married at the time of his death. Marriage is a fact which may be proved by direct or circumstantial evidence, or by documentary or parol evidence. The weight and sufficiency of the evidence to prove marriage is governed by the general rules of evidence. *Bourelle v. Soo-Crete, Inc.*, 165 Neb. 731, 87 N.W.2d 371 (1958).

The general rule is that the burden of proof of marriage is upon the party who pleads it. *Morris v. Equitable Life Assurance Society,* 109 Neb. 348, 191 N.W. 190 (1922). The rule is stated in 52 Am. Jur. 2d *Marriage* § 129 (1970) as follows: "While the distinction is not always clear in many cases, the question of burden of proof in marriage law depends on whether the issue is seen as the existence of a disputed marriage—that is, whether there was ever a genuine attempt to form a marital union—or as the validity of a marriage shown or conceded to have come into existence. Where the issue is whether a

marriage was ever contracted, the view generally taken is that the burden of proof is on the party asserting its existence, especially if the claim is for a common-law marriage.

"On the other hand, where the issue is whether a marriage shown to exist is valid, the general rule is that the person attacking its validity has the burden of proving invalidity. This rule applies to common-law as well as to ceremonial marriages." Under the circumstances in this case the burden of proof was on the petitioner to prove the marriage.

The personal representative urges that the review in this court is de novo. Prior to the repeal of Neb. Rev. Stat. § 30-1606 (Reissue 1979), appeals of this nature were determined de novo in this court. Section 30-1606 was repealed effective August 30, 1981. See Neb. Rev. Stat. § 30-1601 (Cum. Supp. 1982). The review in the District Court is now for "error appearing on the record." Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982).

The case was tried in the District Court on July 13, 1981, and decided September 22, 1981. We have concluded that we need not determine which standard of review is applicable to this case because we reach the same result under either standard.

At the hearing in the county court the petitioner testified that she and Jean F. McCartney were married in a civil ceremony somewhere in Arkansas on December 27, 1977. She testified that she and Jean had left the Omaha area on that date in his car. She was feeling very sleepy and slept during most of the long ride. She testified that they stopped and parked in front of a private residence and she noticed a car that had rolled down an embankment. Before getting out of the car Jean asked her to marry him. They went up to a house and were admitted by an older man. An older woman was also present. A ceremony consisting only of the marriage vows was then performed by the man. Following the ceremony Shirli and Jean signed a "cer-

tificate of marriage," but the document was folded by Jean so that she could see very little of it. They got back in the car and returned to Omaha. Shirli testified that she and Jean had discussed marriage on several occasions, but she did not know in advance that the wedding was to take place.

Shirli's testimony concerning the details of the marriage was extremely vague. Her testimony in an earlier deposition, although somewhat similar, differed in regard to several important details from that given at the hearing.

At the time of the deposition she did not know where the ceremony had taken place. Before the hearing in the county court she consulted a psychiatrist and submitted to hypnosis. She claims that as a result of the hypnotic sessions she was able to recall that the ceremony took place in Arkansas. There is some evidence that Shirli had previously named other states as being the one in which the marriage was performed.

The requirements for a valid marriage in Arkansas are similar to those in Nebraska. Common-law marriages are not recognized and only ceremonial marriages are valid. *Furth v. Furth,* 97 Ark. 272, 133 S.W. 1037 (1911); *Spicer v. Spicer,* 239 Ark. 1013, 397 S.W.2d 129 (1965). There are statutory requirements for a license and blood tests before a marriage may be solemnized. Ark. Stat. Ann. §§ 55-201 et seq. (Repl. 1971).

All arrangements for the wedding had been made by Jean. Shirli had not taken a blood test specifically for the ceremony. She saw the marriage certificate only once after the ceremony and never saw it folded out to its full length. According to Shirli, Jean said that he wanted to keep the location of their marriage a secret so that she would not be able to divorce him.

After their return to Nebraska they did not live together for about 8 months. Shirli continued to live in Omaha while Jean resided at his "ranch" in

Fremont. Shirli testified that she continued to live in Omaha because her son was to graduate from high school and she did not want him to change schools. Shirli and her children moved to Fremont in August 1978.

They told no one of the marriage until February 1978. At that time they told some of their children and some of their friends. Thereafter, Jean McCartney introduced Shirli as his wife to friends and business acquaintances. He told a few of his friends that he and Shirli had been married in Arkansas.

Jean filed his 1978 income tax return as married, filing separately. Jean designated Shirli McCartney, his wife, as the beneficiary for his accumulated sick leave. He changed his life insurance policy beneficiaries to Shirli McCartney, his wife. He listed Shirli as his wife on his medical records and named her as joint tenant on his bank records. Jean McCartney's name appeared on the school records of Shirli's children.

The record shows that after February 1978 the deceased and the petitioner conducted their lives as if they were married. However, evidence that would be sufficient to establish a common-law marriage is not sufficient to establish a marriage under our present law. In *Ropken v. Ropken,* 169 Neb. 352, 354, 99 N.W.2d 480, 483 (1959), this court stated: "Common-law marriages are not recognized in Nebraska by legislative enactment. . . . Cohabitation in Nebraska without a ceremonial marriage is meretricious. It is not evidence of a marital status in this state." In order to prove a marriage the petitioner was required to establish that a ceremonial marriage had taken place.

There is no evidence of a ceremonial marriage except the testimony of the petitioner. Her description of the wedding and what took place on the hurried trip to Arkansas is so vague and indefinite that it is inherently improbable. She remembers

almost no details of the trip, claiming that she was asleep most of the time.

It does not seem reasonably likely that a mature woman would forget the most important details (i.e., time, date, and place) of her wedding ceremony. Nor does it seem likely that anyone not affected by drugs, alcohol, or severe illness could travel that great a distance without remembering many details of the trip or its ultimate destination. See *Taylor v. Taylor,* 230 S.E.2d 924 (W. Va. 1976), in which plaintiff's proof of a marriage ceremony was held to be so incredible that it precluded a finding that a ceremony had taken place.

The lack of any documentary corroboration of her testimony concerning the ceremony is significant. No one has been able to discover any official record of the marriage. Although she claims that she saw the marriage certificate on one occasion in Nebraska, it was not found among the papers and personal effects of the deceased, and was not produced at the hearing.

The hypnotic sessions and the testimony of the psychiatrist cast doubt on her testimony. The psychiatrist called by the petitioner testified that Shirli was "highly influenceable in emotional situations"; that she suffered from a hysterical neurosis characterized by disassociative and conversion phenomenon with amnesia and loss of memory when emotionally stressed; that she tended to go into trances spontaneously; and that she was "highly suggestible and influenceable." On cross-examination this witness admitted that it was possible that Shirli had imagined that the marriage ceremony had taken place.

Although some witnesses testified that the deceased had told them that he and the petitioner had been married in Arkansas, there was other testimony that the deceased had said that he had not married Shirli and would not marry her. Jack McCartney, a brother of the deceased, testified that on

two occasions, once before the alleged date of the marriage and again after that date, the deceased told him he had not married Shirli and did not intend to marry her. Further, there was evidence that the deceased was sometimes untruthful.

The petitioner relies heavily on *Allen v. Allen,* 121 Neb. 635, 237 N.W. 662 (1931), in which this court found upon disputed facts there had been a valid marriage. There are significant differences between the cases.

In the *Allen* case the plaintiff's evidence established that the ceremony had been performed by a Reverend Wilson, an Adventist minister, on September 28, 1923, at Denver, Colorado, where both parties resided. The plaintiff in the *Allen* case had received a certificate of marriage from the officiating clergyman.

The trier of fact was not required to accept the testimony of the petitioner that a ceremonial marriage was performed someplace in Arkansas on December 27, 1977. Uncontroverted testimony need not be accepted as absolute verity, especially when that testimony is opposed to common knowledge or human experience, or is inherently improbable, unreasonable, or unworthy of belief. *Baliulis v. Campbell Soup Company,* 204 Neb. 739, 285 N.W.2d 227 (1979); *Marston v. Drobny,* 166 Neb. 747, 90 N.W.2d 408 (1958); *Sack v. Siekman,* 147 Neb. 416, 23 N.W.2d 706 (1946). The trier of fact has a right to test the credibility of a witness by his self-interest and to weigh undisputed testimony against facts and circumstances in evidence from which a conclusion can be drawn that the testimony is not true. *Riley v. City of Lincoln,* 204 Neb. 386, 282 N.W.2d 586 (1979).

While a rebuttable presumption of a valid marriage may arise upon proof of a ceremonial marriage, we do not reach that question in this case. As we view the record, and as the county court found, the petitioner failed to establish by a preponderance of the evidence that a ceremonial marriage took place.

The judgment of the District Court is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

CAROL A. LORD, APPELLEE, V. PHILLIP L. LORD, APPELLANT.

330 N.W.2d 492

Filed February 25, 1983. No. 81-823.

1. **Property Division.** The rules for determining the division of property in an action for dissolution provide no mathematical formula by which such awards can be precisely determined. Such awards are determined by the facts in each case.
2. _____. How property owned at marriage and acquired by gift or inheritance will be considered in determining division of property or award of alimony depends upon the facts of the particular case and the equities involved.
3. **Appeal and Error.** Failure to file a cross-appeal precludes consideration in this court of errors claimed by appellee against appellant.

Appeal from the District Court for Custer County: JAMES R. KELLY, Judge. Affirmed.

Tedd C. Huston and Steven A. Goeden, for appellant.

John O. Sennett of Black & Sennett, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

MORAN, D.J.

Respondent, Phillip Lord (Phillip), appeals from the amended decree of dissolution which dissolved the marriage, assigned property, allocated debts, and determined child custody and support in an action brought by the petitioner, Carol Lord (Carol). We affirm.

The parties were married on April 22, 1976. They are the parents of two children, born May 2, 1977,

and October 16, 1979. The primary asset of the marital property is their residence. The house was moved onto an acreage, which Carol's father conveyed to her as a gift after the marriage, and was remodeled extensively. The parents paid for some of the improvements. Carol's father, together with members of his family, Phillip's father, and the parties, did considerable labor on the residence. At the trial an attempt was made to value the work done by family members and to set it off from the marital estate as gifts to the party related to the donor. The record does not disclose that the trial judge dealt with the work as gifts, and we do not. The house, exclusive of the land, was appraised at $42,665 and $43,505. Either figure exceeds the value of the equity of the parties in the marital property.

Shortly before she filed the action, Carol transferred 12 cows and 8 heifer calves to her parents, which she claimed was in satisfaction of advancements made by her parents for her college expenses and other debts such as feed bills and pasture rent. These animals consisted of livestock owned by Carol at the marriage and their offspring. Her parents kept and cared for the animals without cost to Carol. Shortly after the marriage, Phillip replaced a calf which had died by purchasing one for $75.

Phillip was employed as a repairman and during the year preceding trial earned $10,800. Carol is a registered nurse and was employed on a part-time basis. At the time of the trial she earned approximately $200 per month.

The amended decree assigned the house, most of the contents, and the land to Carol, together with the automobile she owned before the marriage. The court assigned to Phillip the parties' pickup, the cash value of life insurance policies, and the value of his pension account with his employer. Debts were allocated between the parties, and Carol was ordered to pay Phillip $14,223 in 10 annual installments of $1,422.30, with interest on the unpaid balance at

the current legal rate. Child support due from Phillip to Carol, who was awarded custody of the children, was fixed at $100 per month for each child, and each party was ordered to pay his own attorney fees. The trial court found that the transfer of livestock was in consideration of a debt Carol owed her father.

We determine that after setting off to Carol the land and other improvements paid for by her parents, Carol received, under the amended decree, approximately 69 percent of the marital estate.

Phillip's assignments of error are that Carol was awarded a disproportionate share of the marital property and that the court improperly determined that the transfer of cattle was in consideration of a preexisting debt.

The rules for determining the division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. Such awards are to be determined by the facts in each case. *Burton v. Burton,* 205 Neb. 865, 290 N.W.2d 658 (1980). Statutory guidelines are found in Neb. Rev. Stat. § 42-365 (Cum. Supp. 1982). How property owned at marriage and acquired by gift or inheritance will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved. *Van Newkirk v. Van Newkirk,* 212 Neb. 730, 325 N.W.2d 832 (1982).

Applying these rules to the facts of this case, we find there was no abuse of discretion by the trial court. Of considerable significance here is Carol's duty to provide suitable housing and care for the children.

While we do not agree that the transfer of cattle was in satisfaction of a preexisting debt, it is of no consequence. Phillip's contribution to the herd consisted of the purchase of a calf for $75. The cattle were kept as a part of Carol's father's herd. Neither of the parties cared for or fed them except in-

cidentally as a part of the work they performed from time to time on the ranch. They should be treated as Carol's and are not a part of the marital estate. An adjustment for Phillip's purchasing the calf would be trifling and is not warranted.

In her brief, Carol complains of improper division of personal property, inadequacy of child support, and the interest requirement on the money judgment. However, she did not cross-appeal and assign these determinations as error. Hence, these claims will not be considered. *Peterson v. Strayer,* 121 Neb. 866, 239 N.W. 213 (1931).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY S. COFFMAN, APPELLANT.

330 N.W.2d 727

Filed February 25, 1983. No. 82-142.

1. **Statutes.** A sensible construction will be placed upon a statute to effectuate the object of the legislative intent rather than a literal meaning which would have the effect of defeating such intent.
2. **Escape.** For the purpose of determining whether one has escaped, work release is but temporary leave within the meaning of Neb. Rev. Stat. § 28-912(1) (Reissue 1979).
3. _____. While on work release, under the provisions of Neb. Rev. Stat. §§ 83-183 and 83-184 (Reissue 1981), a prisoner remains subject to the supervision, control, and custody of the Nebraska Penal and Correctional Complex.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

CAPORALE, J.

Defendant-appellant, Larry S. Coffman, appeals from a conviction on the charge of escape. We affirm.

On April 2, 1981, the defendant was assigned on work release to the Omaha Post Care Center while a prisoner at the Nebraska Penal and Correctional Complex. On April 26, 1981, he failed to return to the Omaha Post Care Center. He was later arrested and charged with escape under the provisions of Neb. Rev. Stat. § 28-912 (Reissue 1979). That statute in pertinent part provides: "(1) A person commits escape if he unlawfully removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period. Official detention shall mean arrest, detention in or transportation to any facility for custody of persons under charge or conviction of crime or contempt or for persons alleged or found to be delinquent, detention for extradition or deportation, or any other detention for law enforcement purposes; but official detention does not include supervision of probation or parole or constraint incidental to release on bail."

Defendant argues that as work release is a form of parole, there was insufficient evidence to convict him of escape under the statute cited above. In taking that position he relies upon a series of Attorney General's opinions which advise that for the purpose of determining who has power to grant work release, it is a form of parole. First, it is to be noted that although an Attorney General's opinion is entitled to substantial weight and is to be respectfully considered, it nonetheless has no controlling authority on the state of the law discussed in it, and standing alone is not to be regarded as legal precedent or authority of such character as is a judicial decision. An Attorney General's opinion is, simply, not a judicial utterance. *Follmer v. State,* 94 Neb. 217, 142 N.W. 908 (1913); *Mogis v. Lyman-Richey*

Sand & Gravel Corp., 189 F.2d 130 (8th Cir. 1951), *rehearing denied* 190 F.2d 202, *cert. denied* 342 U.S. 877, 72 S. Ct. 168, 96 L. Ed. 659; 7 Am. Jur. 2d *Attorney General* § 11 (1980).

The question is one of statutory construction. As reiterated in a recent case dealing with escape, *State v. Farr,* 209 Neb. 163, 306 N.W.2d 854 (1981), we must, in construing a statute, keep certain rules in mind. The first of these is that a sensible construction will be placed upon a statute to effectuate the object of the legislative intent rather than a literal meaning which would have the effect of defeating such intent. See, also, *Hill v. City of Lincoln, ante* p. 517, 330 N.W.2d 471 (1983). Further, legislative intent, when apparent from the whole statute, is not to be thwarted by strained and unusual interpretations of particular words not required under the circumstances. If possible, a court will try to avoid a construction which leads to absurd, unjust, or unconscionable results. A statute should be construed in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. *State v. Farr, supra.*

The construction urged by defendant metamorphoses from the merely absurd to the outrageously farcical. Whatever work release may be for the purpose of determining who is empowered to grant it, there can be, and is, no question that for the purpose of determining whether one has escaped it is but "temporary leave."

While on work release a prisoner remains subject to the supervision, control, and custody of the Penal and Correctional Complex. Neb. Rev. Stat. § 83-184 (Reissue 1981) in pertinent part provides: "(1) When the conduct, behavior, mental attitude and conditions indicate that a person committed to the department and the general society of the state will be benefited, and there is reason to believe that the best interests of the people of the state and the person committed to the department will be served

thereby, in that order, and upon the recommendation of the Board of Parole in the case of each committed offender, the Director of Correctional Services may authorize such person, under prescribed conditions, to:

. . . .

"(b) Work at paid employment or participate in a training program in the community on a voluntary basis . . . ." Neb. Rev. Stat. § 83-183(2) (Reissue 1981) provides: "The Director of Correctional Services shall make rules and regulations governing the hours, conditions of labor, and the rates of compensation of persons committed to the department. In determining the rates of compensation, such regulations may take into consideration the quantity and quality of the work performed by such person, whether or not such work was performed during regular working hours, the skill required for its performance, as well as the economic value of similar work outside of correctional facilities." See, also, *State v. Mayes,* 190 Neb. 837, 212 N.W.2d 623 (1973), which holds that the failure to return to a treating facility after temporary leave constitutes an escape from custody.

Defendant was on temporary leave and subject to the control and custody of the penal complex. When he did not return to the Omaha Post Care Center he had obviously escaped. Defendant's argument may be cunning, but it is so devoid of substance as to render this appeal wholly frivolous.

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GRETCHEN HILPERT, ALSO KNOWN AS LETA G. TYLER, APPELLANT.

330 N.W.2d 729

Filed February 25, 1983. No. 82-224.

1. **Directed Verdict: Waiver.** Following a motion for a directed verdict at the close of the evidence of the State, the introduction of evidence thereafter by the defendant waives any error in the ruling or failure of ruling on the motion, although the defendant is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction.
2. **Witnesses: Self-Incrimination: Waiver.** The general rule is that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives.
3. **Criminal Law: Evidence: Joinder.** Evidence offered by one defendant in a joint trial, if competent, is evidence against other persons charged in the same information.
4. **Witnesses: Joinder.** Where one of several defendants on trial together voluntarily becomes a witness, he is a witness for all purposes. If he knows facts injurious to a codefendant, they may be brought out either by his own counsel or by the State.
5. **Criminal Law: Jurisdiction.** Where the requisite elements of a crime are committed in different jurisdictions, if an essential element of the crime is committed in this state, jurisdiction to prosecute is present.
6. **Verdicts: Appeal and Error.** This court will not interfere on appeal with a finding of guilt based upon evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support such finding beyond a reasonable doubt.
7. **Sentences: Appeal and Error.** A sentence imposed within the limits of the statute will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Box Butte County: ROBERT O. HIPPE, Judge. Affirmed.

Dean S. Forney, Box Butte County Public Defender, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

HASTINGS, J.

The defendant, Gretchen Hilpert, and her husband, John B. Hilpert, were charged in separate informations with the crime of theft by deception, a violation of Neb. Rev. Stat. § 28-512(1) (Reissue 1979). Following a stipulated consolidated trial to the court alone, she was convicted and sentenced to a term of imprisonment of 18 months to 2 years. The errors which she has assigned on appeal, listed in the order in which they will be discussed, are essentially as follows: The court erred in that (1) it considered evidence against her which was not introduced as a part of the State's case in chief, nor by her on defense; (2) the evidence was insufficient to establish beyond a reasonable doubt that the crime charged was committed in Nebraska, in that the intent to deprive, an essential element of the crime, did not occur within the State of Nebraska; (3) the evidence was insufficient generally to establish beyond a reasonable doubt that the defendant committed the crime charged; and (4) the sentence was excessive.

This prosecution arose out of a substantial shortage of funds which developed in a certain guardianship estate wherein John B. Hilpert was the guardian and attorney and the defendant, as John's secretary, apparently actually administered the estate.

At the beginning of the trial, the following colloquy occurred between the court and counsel: "THE COURT: . . . Both of these [cases] have been consolidated for purposes of trial and in both trial by jury has been waived and they are being tried before the Court. . . . MR. MARGHEIM [counsel for John B. Hilpert]: Your honor, we have one procedural matter to ask the Court. THE COURT: Surely. MR. MARGHEIM: We are asking for advice on this. These two cases are consolidated for purposes of trial but presume that that still leaves each defendant with the right to present their individual defenses, possibly conflictive de-

fendants [sic], and each individual defendant to testify or not testify? THE COURT: Yes, that will be all right. MR. MARGHEIM: Okay." The record further reflects that Mr. Forney was present representing the defendant Gretchen, and voiced no objection to those statements. The State then presented its case in chief and rested. John B. Hilpert testified in his own behalf and called as a witness the defendant Gretchen, who also testified. No objection to nor request for limitation of applicability of the testimony of either of these witnesses was voiced by the defendant Gretchen. Following John B. Hilpert's rest, counsel for the defendant Gretchen announced that no evidence would be offered in her behalf.

The State's case in chief consisted of testimony by Samuel L. O'Brien, a former county judge of Box Butte County; Lane Nansel, vice president and cashier of the Guardian State Bank, Alliance; L. Leroy Schommer, also a vice president of that bank; Albert T. Reddish, an Alliance attorney; and Lois Pedersen, vice president of the Alliance National Bank; and a great deal of documentary evidence.

Mr. O'Brien identified in person both the defendant and John B. Hilpert. He also testified that John was appointed guardian of the particular estate, that he signed various documents, and that the defendant worked for John as a secretary from the mid-1960s to 1972.

The various annual reports covering the period from September 17, 1971, to September 15, 1979, purportedly made out by the guardian, John B. Hilpert, were examined by the witness Lane Nansel. Each of those reports contained what appeared to be the signature of Lane R. Nansel, as vice president of the bank, certifying the accuracy of the amounts claimed on the report to be on deposit in the bank. However, he testified that with the exception of the one for the year September 17, 1971, to September 16, 1972, none of his signatures were genuine. As

examples of discrepancies in the reports, the witness pointed to his purported certification for the year ending on September 15, 1979, which showed $34,000 in certificates of deposit with his bank, whereas in fact there was but $7,500, and for the year ending on September 16, 1973, an alleged balance of $10,000 in savings certificates, as compared to an actual balance of $5,500. The report for that same year disclosed that the guardian had written a check to the Guardian State Bank in the amount of $5,000 for a certificate of deposit, whereas Mr. Nansel testified that no such certificate was purchased during that time period. Similar instances of false information were detailed by this witness as to many of the other reports.

Mr. Nansel also testified that as of September 24, 1979, there was a total of $8,000 in certificates of deposit in the guardianship account, and that two certificates in the total sum of $5,500 were cashed on April 24, 1980, leaving a June 24, 1980, balance in certificates of deposit of $2,500. He also stated that during the period April 24, 1972, to June 24, 1980, there never was a balance in time certificates for the guardianship of more than $8,000. However, the report for the year ending September 15, 1977, showed a balance of $24,000; for September 15, 1978, a balance of $29,000; and for September 15, 1979, a balance of $34,000.

Exhibit 10 is a photocopy of one Guardian State Bank cashier's check in the amount of $5,489, dated April 24, 1980, payable to the guardianship account in the Alliance National Bank, stamped endorsed for credit to that account, and a draft dated August 7, 1980, in the amount of $2,461.35, drawn on the Colorado National Bank of Denver with the Guardian State Bank as payor, "John B. Hilpert Guardian of Harold E. Uhrich" as payee, with a hand-printed endorsement as follows:

"John B. Hilpert, Guardian
of Harold E. Uhrich
For Deposit Only
Gretchen Hilpert
02-244578
/s/ Gretchen Hilpert."

The $5,489 figure represented the $5,500 of certificates cashed in April, and the $2,461.35 figure represented the balance of the certificates then remaining. These transactions were initiated by way of letters from John B. Hilpert. However, according to a handwriting expert, John B. Hilpert's signature on one of the letters requesting the bank to cash the certificates of deposit was actually written by the defendant. With the payment of $2,461.35, according to Mr. Nansel, any balance which the guardianship had with his bank was "wiped out."

The witness Lois Pedersen of the Alliance National Bank testified that there was a total of approximately 25 checks written on the guardianship account naming defendant as payee, signed by John B. Hilpert, and endorsed by the defendant. The checks were in varying amounts, ranging from $100 to $5,000, totaling something in excess of $14,000, and covered the period from March 10, 1979, to July 31, 1980. The signatures of both parties were verified by a handwriting expert. Ms. Pedersen also testified that the $5,489 cashier's check previously mentioned was deposited in her bank and that shortly thereafter a check in the amount of $5,000, signed by John B. Hilpert, made out to the defendant and endorsed by the defendant to her account, was paid.

L. Leroy Schommer, formerly an employee of the Alliance National Bank, also testified that as to several of the certifications of balance on deposit contained in the guardian's annual reports, the signatures purporting to be his were not in fact genuine.

The witness Albert T. Reddish testified to his acquaintanceship with John B. Hilpert and the defend-

ant, that John practiced law in Alliance, and that the defendant worked as John's secretary. He described conferences with the family of the ward requesting a change in the guardian and correspondence with John B. Hilpert and the defendant, who were then in California, to accomplish this change. In spite of his various requests he never did receive an accounting from John B. Hilpert. According to Mr. Reddish's comparison of the guardian's reports and the bank statements, there was a discrepancy between the two of something over $45,000. Following a hearing in county court, he reported that the county judge suspended Mr. Hilpert's authority as guardian and assessed a surcharge against him of $70,174.41.

Following the State's rest, both the defendant and John B. Hilpert moved to dismiss the information, ruling upon which was reserved by the court. It is not necessary for us to review the propriety of such action by the trial judge for two reasons: The defendant does not assign such action as error, nor does she argue it in her brief; secondly, in *Henggler v. State,* 173 Neb. 171, 112 N.W.2d 762 (1962), we held that following a motion for a directed verdict at the close of the evidence of the State, the introduction of evidence thereafter by the defendant waives any error in the ruling or failure of ruling on the motion, although the defendant is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction.

John B. Hilpert offered testimony in his own behalf. He explained how he turned the accounting of his activities as guardian over to the defendant. Initially, he would have the defendant make out the various checks in payment of the bills of the guardianship, and then he would sign them. He then told how, a few months after he took over this guardianship in 1965, he would sign checks in blank and turn them over to the defendant. He agreed that he did not set up any controls whereby he could

verify her actions. He then described how, in April of 1972, he was told by the defendant that the guardianship was short some $5,000 and intimated that it was his fault because of having turned signed blank checks over to her. It was then that they cashed a number of the guardianship's savings bonds to be placed in the checking account. According to John B. Hilpert's testimony, the defendant expressed regret over what she had done; but in spite of all this, Hilpert continued to rely upon the defendant to do all the bookwork, continued to allow her to manage the money by furnishing her with signed blank checks, continued to sign the annual reports prepared by the defendant without examining them, and at no time made any examination to determine how much money was left in the guardianship account or to verify what the defendant had told him as to what was missing. He made no check of bank statements, deposit slips, or anything of that nature. According to his testimony, it was not until sometime in the summer of 1980, during a casual conversation when they were living in Sacramento, that he discovered that the actual shortage was then about $50,000. He admitted that sometime in July of 1980 he made the decision not to file an accounting with the court.

The defendant was then called as a witness by John B. Hilpert, and when asked about the shortage in the guardianship account, she explained that "I comingled [sic] the money." She admitted that she changed the figures on the 1971-72 guardian's report after the bank officials had signed the certification. The defendant admitted that she used some of the money which caused the shortages for her own use. She said that all of the checks which were made out to her had been signed by John B. Hilpert in blank, that she would deposit them to her account as needed, and that she knew that what she was doing was illegal. She said that she never told John B. Hilpert about putting guardianship money in her ac-

count. She also said that she was sure that at one time, at least, she had promised John B. Hilpert that she would not misappropriate any more money.

Following the defendant's testimony, John B. Hilpert's counsel announced that he would rest his case. The following colloquy then occurred between the court and counsel: "THE COURT: The defendant Gretchen Hilpert really, technically, didn't offer testimony, isn't that right, she was testifying for defendant John Hilpert? MR. FORNEY: That's right, Your Honor. THE COURT: Do you have any evidence, Mr. Forney? MR. FORNEY: No, Your Honor, we have no evidence on behalf of Leta Hilpert in her case. THE COURT: Then does the state offer rebuttal of John Hilpert? MR. PAYNE: We have none." Both John B. Hilpert and the defendant, through counsel, renewed the "motion made at the close of the state's evidence," in answer to which the court indicated that he would have the same ruling.

In her first assignment of error, the defendant insists that because of the closing comments set forth above, as well as the opening stipulation, neither her own testimony nor that of John B. Hilpert is available as evidence in her case. We disagree. There is obviously no constitutional barrier to the utilization of this testimony as violating the right to cross-examination or against self-incrimination. "The general rule is that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. . . . 'A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives . . . .' " *State v. Robinson,* 202 Neb. 210, 215, 274 N.W.2d 553, 556 (1979).

Nor was it necessary for the State to specifically cause such evidence to be introduced in the defendant's case. By the very nature of a common or consolidated trial, all evidence received is equally binding on all defendants unless otherwise re-

stricted. Evidence offered by one defendant in a joint trial, if competent, is evidence against other persons charged in the same indictment. *State v. Linden,* 171 Wash. 92, 17 P.2d 635 (1932). " 'Where one of several defendants on trial together voluntarily becomes a witness, he is a witness for all purposes. If he knows facts injurious to a co-defendant, they may be brought out either by his own counsel or by the State. . . .' " *Stanley v. State,* 189 Tenn. 110, 122, 222 S.W.2d 384, 389 (1949). " 'Evidence given by a defendant on his own behalf, upon his trial for a criminal charge is competent, and proper for the consideration of the jury, both for and against a co-defendant jointly upon trial.' [Citation omitted.]" *Kennon v. State,* 181 Tenn. 415, 423, 181 S.W.2d 364, 367 (1944).

If the testimony offered by John B. Hilpert in some way was not relevant or competent as to defendant, or if she did not wish to waive her fifth amendment right against incrimination, she should have raised the proper objections at the time. However, "[t]he fact that one defendant wishes to use the other as a witness does not of itself entitle him to a separate trial." *State v. Pelton,* 197 Neb. 412, 419, 249 N.W.2d 484, 488-89 (1977).

The defendant's next assignment of error relates to her claim that the State of Nebraska had no jurisdiction over her for this alleged crime because it was not committed in Nebraska. The crime charged was "theft by deception." There are two elements which must necessarily be present before such crime is committed: (1) The obtaining of the property of another by deception, and (2) With the intent to deprive the owner thereof. Neb. Rev. Stat. §§ 28-511, 28-512 (Reissue 1979). The defendant refers to the trial court's memorandum opinion in which it is suggested that the element of intent was formed in the mind of the defendant while in California. Therefore, she suggests, since all of the ele-

ments of the crime did not occur in Nebraska, Nebraska does not have jurisdiction.

She relies particularly on the case of *State v. Karsten,* 194 Neb. 227, 231 N.W.2d 335 (1975), for the proposition that penal statutes are essentially local in nature and that Nebraska may not prosecute individuals for alleged crimes committed outside the state. However, that case involved a prosecution for a conspiracy to commit an assault in Colorado. No battery was ever committed. We simply held in that case that Nebraska had no jurisdiction because no Nebraska law was violated. "However, the Nebraska assault statute has no force in Colorado where the assault which was the subject of the conspiracy in this case was to have taken place. It was error for the District Court to submit the case to the jury upon the theory that Nebraska law was applicable to an act which was to be performed in Colorado." *Id.* at 229, 231 N.W.2d at 337. Simply stated, the decision holds that, on the facts presented, it was not a violation of Nebraska law for the defendant to conspire to break the law of another state.

Forney v. State, 123 Neb. 179, 242 N.W. 441 (1932), and *State v. Hyslop,* 131 Neb. 681, 269 N.W. 512 (1936), also relied upon by the defendant, are also distinguishable. In the present case we are not confronted with the situation where the act constituting the crime occurred outside the state. The property was taken within this state upon presentation of the checks for payment to a bank located in this state under the terms of a guardianship established by the courts of this state.

We are therefore faced with the question of whether or not all of the elements of an offense must occur within the state, as contended for by the defendant. We are unable to find any Nebraska authority on this point. Turning to other jurisdictions, we observe two well-defined rules of law applicable to jurisdictional questions arising in embezzlement cases. The clearest statement of these rules has

been made by the Arizona Supreme Court. One such rule is demonstrated in *State v. Scofield,* 7 Ariz. App. 307, 438 P.2d 776 (1968). In that case the defendant leased a car in Arizona, crossed the state line, and after leaving the State of Arizona, decided to convert the automobile to his own use. In holding that the crime occurred in Arizona, the court said: "Generally, the State of Arizona has no jurisdiction over offenses committed outside of its territorial limits. 21 Am.Jur.2d Criminal Law § 383, at 403-04; 22 C.J.S. Criminal Law § 133, at p. 353; and see State v. Jacobs, 93 Ariz. 336, 380 P.2d 998 (1963). However, it is also generally accepted that if the requisite elements of the crime are committed in different jurisdiction [sic], any state in which an essential part of the crime is committed, may take jurisdiction, 21 Am.Jur.2d Criminal Law § 385, at 404, and this is particularly true as to the state in which the crime is consummated. 22 C.J.S. Criminal Law § 133b, at p. 355. See Commonwealth v. Thomas, 410 Pa. 160, 189 A.2d 255, 5 A.L.R.3d 879 (1963), and cases cited therein." *Id.* at 315, 438 P.2d at 784. This position is also taken by Nevada. See *Sheriff v. Thompson,* 85 Nev. 211, 452 P.2d 911 (1969).

The other rule, perhaps more nearly in point as far as the facts of the present case are concerned, is found in *State v. Roderick,* 9 Ariz. App. 19, 448 P.2d 891 (1968). The rule there applies to a defendant who embezzles funds from an account entrusted to him or her, with the intent to do so being formed in a state different from that in which the funds are located. The Arizona court said: "The defendant contends that the State of Arizona had no jurisdiction since the offense was committed outside of its territorial limits. We have recently held, however, that if the requisite elements of a crime are committed in different jurisdictions, any state in which an essential part of the crime is committed may take jurisdiction. State v. Scofield, 7 Ariz.App. 307, 438 P.2d 776 (1968); see also, A.R.S. § 13-112. If, as we

shall subsequently discuss, the defendant committed theft by embezzlement, then the state in which he had a duty to account, namely Arizona, had jurisdiction. State v. Hoffman, 171 Kan. 116, 229 P.2d 768 (1951); Williams v. State of Oklahoma, 365 P.2d 569 (Okl.Cr.App., 1961); State v. Douglas, 70 S.D. 203, 16 N.W.2d 489 (1944); 22 C.J.S. Criminal Law § 185(11)." *Id.* at 21, 448 P.2d at 893.

In line with the foregoing authorities, we hold that where the requisite elements of a crime are committed in different jurisdictions, if an essential element of the crime is committed in this state, jurisdiction to prosecute is present. In this case, by taking funds from a guardianship account created by the courts of this state and to which courts the defendant and John B. Hilpert had a duty to account, and which funds were taken out of a bank account in this state by means of written orders drawn and constructively presented for payment by the defendant, we conclude that one or more of the essential elements of the crime have been committed within this state so as to confer jurisdiction.

From a review of the essential facts detailed above, it should be apparent that there was substantial evidence to support a conviction of the defendant. This court will not interfere on appeal with a finding of guilt based upon evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support such finding beyond a reasonable doubt. *State v. Olson*, 200 Neb. 341, 263 N.W.2d 485 (1978).

Finally, we consider the defendant's claim that the sentence imposed upon her was excessive. The defendant was charged and found guilty of theft of property in the "value of more than $1,000." This is a Class III felony as provided for in Neb. Rev. Stat. § 28-518 (Reissue 1979), which provides for a possible maximum term of imprisonment of 20 years. We have said on numerous occasions that a sentence imposed within the limits of the statute will not be

disturbed on appeal absent an abuse of discretion. *State v. Kelly,* 207 Neb. 295, 298 N.W.2d 370 (1980).

This case involved a series of thefts over a prolonged period of time by one in a position of trust and who showed little if any true remorse. The trial judge conducted a detailed sentencing hearing in which counsel for the defendant, as well as for John B. Hilpert, was permitted to address the court in detail. The judge reviewed the criteria for sentencing and probation, and rejected the latter. The record appears to support a thorough and mature consideration of all the circumstances of the case. There was no abuse of discretion.

The judgment and sentence of the District Court are affirmed.

AFFIRMED.

CLINTON, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. JOHN B. HILPERT, APPELLANT.

330 N.W.2d 736

Filed February 25, 1983. No. 82-206.

1. **Aiding and Abetting.** Where a defendant has knowledge that another is violating the law, or possesses information sufficient to place a reasonable person on inquiry as to the possibility that such violations are taking place, yet continues to furnish essential materials for the purpose of continuing such violations, he may be guilty of aiding and abetting such criminal activity.
2. _____. The evidence is sufficient to convict a person as an aider and abettor if it shows that the crime was committed by someone and that the defendant incited or instigated, i.e., aided and abetted in, its commission. Such evidence may be circumstantial only, but if the facts which such evidence tends to establish may be accounted for upon no rational theory which does not include the guilt of the accused, it is sufficient to sustain a conviction.

Appeal from the District Court for Box Butte County: ROBERT O. HIPPE, Judge. Affirmed.

Laurice M. Margheim of Bayer & Margheim, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

HASTINGS, J.

This case was consolidated for trial in the District Court and argued here with *State v. Hilpert,* which appears *ante* p. 564, 330 N.W.2d 279 (1983). That opinion contains a complete recitation of the essential facts, which will not be repeated here. Also, it disposed of all assignments of error raised here, with one exception, i.e., that the District Court erred in finding that the intent to deprive, an essential element of the crime of theft by deception, could be inferred from evidence of breaches of a fiduciary relationship. The trial judge, in his memorandum opinion, did make such a statement. However, the essential inquiry which we must make is whether or not the defendant was guilty, beyond a reasonable doubt, of committing the acts necessary to establish his guilt.

As stated in our previous opinion, the defendant had known as early as April of 1972 that Gretchen Hilpert had been converting to her own use assets of the guardianship estate of which he was the guardian. It was clear that this had been accomplished only because the defendant had, without restriction, given her checks on the account, which he had signed in blank. Nevertheless, he continued this same practice throughout the ensuing years and into 1980. At no time did he ever make any investigation of his own to determine the actual amount of the shortage—he made no examination of the annual reports which he had signed in the past or which he approved in the future; he made no comparisons with the bank statement so as to verify deposits,

withdrawals, and balances; and he made no inquiry to ascertain the use to which Gretchen was putting the blank checks, although he knew from past experience that she had been using them for her own account. He was aware of the fact that after leaving Nebraska for California in 1973, both his and Gretchen's employment was sporadic at best. He testified that he observed the August 7, 1980, draft in the amount of $2,461.35 in their possession which, it develops later, was endorsed by Gretchen to herself and deposited in her account. He admitted that he did not tell her what to do with the draft, did not know that she was going to deposit it in her account, and believed that she would return it to the guardianship account, even though he was fully aware of the fact that she had twice before confessed to misappropriation of guardianship funds. When asked whether, after becoming aware of the initial shortage, he ever thought about contacting the bonding company, he replied, "They would be the last people I would contact."

For the defendant to claim he did not know that by continuing his practices of the past, specifically the handing over to Gretchen of signed blank checks without supervision, she would continue to steal from the guardianship account is simply utterly fantastic and incredible.

In *United States v. Wilson,* 59 F.2d 97, 98 (W.D. Wash. 1932), the court said: "Where a defendant has knowledge that another is promoting a violation of the prohibition law and in need of materials for furthering the enterprise, and such defendant, with such knowledge, furnishes the necessary materials for the purpose of forwarding the unlawful purpose, making it possible to accomplish the unlawful act, he is guilty. . . .

"In the instant case the defendant had, no doubt, knowledge of the sale and the purpose for which used, or at least *such as to put a reasonable person on inquiry.*" (Emphasis supplied). To the same

effect is *Pattis v. United States,* 17 F.2d 562, 566 (9th Cir. 1927), where the court said: "The court clearly instructed the jury that, if defendant had knowledge that Jensen and Clark were in a conspiracy to violate the National Prohibition Act, as charged in the indictment, and that they were purchasing material for that purpose pursuant to such conspiracy, and defendant, with such knowledge, assisted and aided Jensen and Clark by selling and delivering the materials to be used, thus making it possible to carry out the unlawful object of the conspiracy, defendant was a coconspirator. This is a correct statement of the law and supported the verdict upon either or both counts."

The evidence is sufficient to convict a person as an aider and abettor if it shows that the crime was committed by someone and that the defendant incited or instigated, i.e., aided and abetted in, its commission. Such evidence may be circumstantial only, but if the facts which such evidence tends to establish may be accounted for upon no rational theory which does not include the guilt of the accused, it is sufficient to sustain the conviction. *State v. Davis,* 185 Neb. 433, 176 N.W.2d 657 (1970).

The evidence in this case was sufficient to sustain a finding beyond a reasonable doubt that the defendant was guilty as an aider and abettor of the crime of theft by deception.

As to the claim of excessiveness of the sentence, which was for a term of 18 months to 2 years, we believe that our comments in *State v. Hilpert, supra,* are equally applicable here.

The judgment and sentence of the District Court are affirmed.

AFFIRMED.

CLINTON, J., not participating.

WAYNE E. SHANKS, APPELLANT, V. THE CITY OF SOUTH SIOUX CITY, NEBRASKA, APPELLEE.

330 N.W.2d 494

Filed February 25, 1983. No. 82-359.

Special Assessments: Proof. The general rule is that payments are presumed to be voluntary, and the party seeking to recover a payment has the burden to prove that it was involuntary.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Affirmed.

Leamer & Rager, for appellant.

Wayne E. Boyd, City Attorney, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

This is an appeal from the denial of a claim by a city council. The record indicates that the case was tried on a stipulation of facts, but no bill of exceptions has been filed in this court. It is the responsibility of the appellant to see that the bill of exceptions is filed in this court. Neb. Ct. R. 5C(5) (Rev. 1982).

The claim appears to have arisen out of the payment of a paving assessment on Lot 2, Block 40, of the town of Covington, now annexed to South Sioux City, Nebraska; property which was owned by Wayne E. Shanks. Dakota County, Nebraska, had commenced a tax foreclosure action against the property and the lien of the special assessment was foreclosed in the proceeding. The property was sold for less than the costs of the action to Norris Leamer and later conveyed by Leamer to Shanks.

On September 17, 1980, Darlene E. Shanks, the wife of Wayne E. Shanks, authorized Equitable Federal Savings and Loan Association of Fremont, Nebraska, to pay the assessment from proceeds of a mortgage on the property. The foreclosure sale was confirmed on October 7, 1980. The assessment was

paid to the City of South Sioux City, Nebraska, on October 20, 1980, by the savings and loan association.

The trial court found that the payment was voluntary, had been made by the agent of the claimant at his request and with full knowledge of the facts, and could not be recovered.

The general rule is that payments are presumed to be voluntary, and the party seeking to recover a payment has the burden to prove that it was involuntary. *Hersch Buildings, Inc. v. Steinbrecher,* 198 Neb. 486, 253 N.W.2d 310 (1977). See, also, 70 Am. Jur. 2d *Special or Local Assessments* § 210 (1973).

In the absence of a proper bill of exceptions, the only issue on appeal is whether the pleadings are sufficient to support the judgment. *Nimmer v. Nimmer,* 203 Neb. 503, 279 N.W.2d 156 (1979).

While the "pleadings" are somewhat irregular, they are sufficient to support the judgment. The judgment is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. SCOTT E. SPRAGUE, APPELLEE.

330 N.W.2d 739

Filed February 25, 1983. No. 82-369.

1. **Statutes.** One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.
2. **Constitutional Law: Statutes.** A person to whom a statute may be constitutionally applied will not be heard to challenge the statute on the ground that it might conceivably be applied unconstitutionally to others in situations not before the court.
3. **Statutes.** The test for determining whether a statute is vague is whether it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.
4. _____. A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding.

5. _____. In determining whether a statute is vague and therefore does not give a defendant adequate notice that his conduct is proscribed, the statute must be examined in light of the conduct with which the defendant is charged.
6. **Prosecutorial Discretion: Constitutional Law: Discrimination.** The general rule regarding prosecutorial discretion in law enforcement is that, unless there is proof that a particular prosecution was motivated by an unjustifiable standard based, for example, on race or religion, the use of such discretion does not violate constitutional protections.
7. **Constitutional Law: Statutes: Administrative Law.** The Legislature may authorize an agency to make rules and regulations for the operation and enforcement of a law, such to be limited to rules within the express legislative purpose of the act and to be administered in accordance with standards expressed in the act.
8. _____: _____: _____. No unconstitutional delegation of authority occurs when the Legislature defines a crime and sets a penalty therefor, but delegates the implementation of details to an administrative agency.
9. _____: _____: _____. The manner and method of enforcing a law may be delegated, since of necessity this must be left to the reasonable discretion of administrative officers.
10. **Constitutional Law: Statutes: Discrimination.** That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy.
11. _____: _____: _____. It has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the equal protection clause of the fourteenth amendment if any state of facts reasonably can be conceived that would sustain it.

Appeal from the District Court for Brown County: HENRY F. REIMER, Judge. Exceptions sustained.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellant.

Cassel & Cassel, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

BOSLAUGH, J.

This is a proceeding in error under Neb. Rev. Stat. § 29-2315.01 (Reissue 1979) to review an order of the District Court affirming the judgment of the county court which dismissed the complaint against the defendant.

The complaint, filed April 23, 1980, charged that the defendant had violated Neb. Rev. Stat. § 37-1111 (Reissue 1978), which prohibits the operator of a motor vehicle from entering a permit area without a valid motor vehicle entry permit permanently affixed to the vehicle. The county court found that the statute was unconstitutionally vague and indefinite and dismissed the complaint.

There is no dispute concerning the facts. The record shows, and the county court found, that the defendant drove his motor vehicle into the Long Pine State Recreation Area on April 20, 1980, without having a motor vehicle park entry permit affixed to the vehicle.

There is only one entrance to Long Pine State Recreation Area. The area had been designated as a permit area, and at the entrance there was an unobstructed sign 14 inches by 18 inches, posted 4 feet above the ground, which read:

NEBRASKA
STATE PARK
PERMIT

VALID
VEHICLE
ENTRY PERMIT
REQUIRED TO
ENTER
THIS PARK AREA

APRIL 1st. OCT. 31st.

The defendant saw and read the sign and knew that a permit was required and that a permit was not affixed to his vehicle. The defendant had parked his vehicle in the restricted area and was picnicking with his family when he was approached by a State Game and Parks Commission conservation officer. After the officer ascertained that the defendant did not have a permit, he issued a citation to the defendant. The defendant attempted to buy a permit from

the officer, but he refused to sell one to the defendant because that was contrary to the established policy of the commission.

The park entry permit system was established in 1977. In 1978, the first year the permits were required, an officer, upon finding a violator, was instructed to warn the offender and advise him to leave or to sell him a permit. In 1979 citations were given to those who refused to leave after a warning. In 1980 and 1981 no permits were sold by the officers to offenders, and the law was strictly enforced. Citations would not be issued to someone who drove through the park without stopping or who was looking for the office.

The law applies only to motor vehicles and motorcycles. Persons who walk or ride a bike into the park do not need to purchase a permit.

The following statutory provisions are involved in this appeal.

Section 37-1111 provides: "It shall be unlawful for any motor vehicle to enter a permit area unless such motor vehicle has permanently affixed thereto a valid permit, except as provided by sections 37-1101 to 37-1114. Any operator of a motor vehicle which enters a permit area without a valid permit, unless in direct and continuous travel to the commission office at such area for the purpose of procuring such permit or as otherwise excepted under section 37-1103, shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine of not less than fifteen dollars."

Neb. Rev. Stat. § 37-1102(3) (Reissue 1978) defines "permit areas" as follows: "Permit areas shall mean those areas, or portions of areas, of the Nebraska state park system which are defined in subdivisions (2), (3), (4), and (5) of section 81-815.22, and which are designated as provided in sections 81-815.23 and 81-815.24, for which entry permits shall be required by the commission as provided in sections 37-1101 to 37-1114."

The implementing regulation defines "permit area" as follows:

"5-(1)(1)i Definitions

. . . .

"Permit Area: Those areas of the Nebraska State Park System designated by the Game and Parks Commission for which entry permits shall be required.

"5-(1)(1)ii Operation

"Designated permit areas or portions thereof requiring a valid motor vehicle entry permit shall be defined as follows unless otherwise posted: All State Parks, all State Recreation Areas except Brownville and the Ak-Sar-Ben Aquarium parking facility at Schramm Park State Recreation Area and the motorcycle trails portion of Fremont Lakes State Recreation Area, and Mormon Island and Windmill State Wayside Areas as defined in Section 81-815.22, Revised Statutes of Nebraska. Those sites within such areas designated as concession and/or seasonal cabin areas shall be classified as exempt from the entry permit requirement. Unless otherwise posted, all remaining State Wayside Areas and all State Historical Parks shall be classified as non-permit areas and exempt from the entry permit requirement."

The county court found that the statutory definition of "permit areas," as implemented by the regulations and warning signs posted at the entrances to the permit areas, was unconstitutionally vague and indefinite because motorists were not advised as to the enforcement policies adopted by the commission and there was an improper delegation of discretion in contravention of Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981). The defendant argues that the delegation of authority to the State Game and Parks Commission to designate the permit areas is unconstitutional and the system of requiring permits only for motor vehicles makes an unreasonable classification.

The State argues that the statutory definition of "permit areas" is not vague; that the State has no duty to advise by sign of the consequences of failing to obey the law; and that no improper delegation of authority occurred as a result of the statutory scheme.

The State contends that the defendant has no standing to raise a vagueness challenge to § 37-1111. The record shows, and the county court found, that the defendant knew by reading the sign that a permit was required but entered the park anyway. The State argues that one who is on notice that his conduct is proscribed can not challenge for vagueness the law which proscribes it.

In *State v. Shiffbauer,* 197 Neb. 805, 251 N.W.2d 359 (1977), we refused to decide a vagueness challenge, stating, " 'One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.' " *Id.* at 809, 251 N.W.2d at 362.

In *Shiffbauer, supra,* we quoted from *Parker v. Levy,* 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974). In the *Parker* case the Court reversed a circuit court of appeals decision which gave the defendant Levy standing to challenge a law for vagueness. Levy based his challenge on the law's hypothetical application to others, "a blending of the doctrine of vagueness with the doctrine of overbreadth." *Id.* at 756. In denying Levy standing for such a challenge the Court stated that one who receives fair warning that his conduct is criminal from the statute in question is not entitled to attack it for vagueness because it does not give fair warning with respect to other conduct which it proscribes.

In *State v. Greaser,* 207 Neb. 668, 300 N.W.2d 197 (1981), we said of the defendant's overbreadth challenge: "A person to whom a statute may be constitutionally applied will not be heard to challenge the statute on the ground that it might conceivably be applied unconstitutionally to others in situations not before the court." *Id.* at 669-70, 300 N.W.2d at 198.

See, also, *State v. Brown,* 191 Neb. 61, 213 N.W.2d 712 (1974).

Since the defendant was on notice that his conduct was prohibited, under the rules cited above, he has no standing to make such a challenge. Implicit in his argument is that the statute must be deemed vague because others may not be put on notice by the statute. This argument also fails because he has no standing to challenge the statute on the basis of overbreadth. See, also, *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

If we assumed that Sprague had standing to raise a vagueness challenge, we would conclude that the statutory term "permit area" is not impermissibly vague.

The test for determining whether a statute is vague is whether it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. *State ex rel. Douglas v. Herrington,* 206 Neb. 516, 294 N.W.2d 330 (1980); *Rose v. Locke,* 423 U.S. 48, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975). A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding. *State v. Metteer,* 203 Neb. 515, 279 N.W.2d 374 (1979). In determining whether a statute is vague and therefore does not give a defendant adequate notice that his conduct is proscribed, the statute must be examined in light of the conduct with which the defendant is charged. *State v. A. H.,* 198 Neb. 444, 253 N.W.2d 283 (1977).

The defendant argues that the term "permit area," defined as an area which requires a permit for entry, is unconstitutionally vague because the definition is circular. This does not render the statute vague. The prohibition against vagueness does not invalidate a statute simply because it could have been drafted with greater precision. The test is whether the defendant could reasonably understand

that his conduct was proscribed by the statute. *Rose v. Locke, supra.*

It is clear that the defendant could understand from the statute that entering a designated park by vehicle without a permit was prohibited. Further, the defendant did so understand after reading the sign. It is likewise evident that the term "permit area" can be easily understood by resort to its definition in common usage. A permit is "any document which grants a person the right to do something" (Black's Law Dictionary 1026 (5th ed. 1979)); in this case, the right to enter a park area designated as one requiring such a permit. When judged by the applicable criteria, the term "permit area" is not impermissibly vague.

The State next argues that the finding that the State was required to give notice of certain facts relating to enforcement policies in the roadway sign was erroneous. Specifically, the county court found that the sign did not give notice of the fact that an entry permit could not be purchased after entry; that compliance was not required of vehicles which entered but did not stop; that citations would be issued to persons who entered the park by vehicle and used its facilities without a permit; that conservation officers would not aid violators in complying with the law; and that by informal policy a conservation officer could exercise discretion in issuing citations.

The county court held that the failure to give notice of these facts either in the statute, the regulations, or the sign rendered the statute unconstitutionally vague, as it did not give the violator adequate notice of what was prohibited and the informal enforcement policy was an improper delegation of authority in contravention of §§ 84-901 et seq.

The State has no obligation to give notice of these facts by statute, regulation, or sign. Due process requires that a statute put men of reasonable intelligence on notice of what it forbids or requires. *Rose*

v. Locke, supra. Section 37-1111 provides such notice, and includes notice of the fact that a motorist "in direct and continuous travel to the commission office" to secure a permit will not be deemed in violation of the statute.

Due process does not require that notice be given, whether by statute, regulation, or sign, of an agency's enforcement policy. The general rule regarding prosecutorial discretion in law enforcement is that, unless there is proof that a particular prosecution was motivated by an unjustifiable standard based, for example, on race or religion, the use of such discretion does not violate constitutional protections. *State v. Bartlett,* 210 Neb. 886, 317 N.W.2d 102 (1982); *State v. Long,* 206 Neb. 446, 293 N.W.2d 391 (1980); *State v. Bird Head,* 204 Neb. 807, 285 N.W.2d 698 (1979). It follows that there is no constitutional right to notice that such discretion may be exercised.

Neb. Rev. Stat. § 37-1110 (Reissue 1978) requires in part: "The commission shall post signs at all entrances to permit areas and the text of such signs shall clearly convey the fact that motor vehicles using the area are required to display a permit." This statutory requirement was complied with. As noted before, due process does not require any notice other than that the statute must inform adequately of what is forbidden or required. Once this requirement is met, and in the absence of a statutory notice provision, the law presumes that an actor who has reached the age of accountability knows the law. *Satterfield v. State,* 172 Neb. 275, 109 N.W.2d 415 (1961). See, also, *State v. Montoya,* 91 N.M. 262, 572 P.2d 1270 (1977). The constitutional and statutory notice provisions having been met, Sprague is presumed to know the law and can not be heard to argue that the sign did not adequately inform him of the statute's provisions.

The failure to detail enforcement procedures in the statute and regulations was not an improper

delegation of discretion in contravention of §§ 84-901 et seq. Article 9 of Chapter 84, entitled "Rules of Administrative Agencies," relates to the adoption of rules and the procedure in contested cases. As noted earlier, permitting discretion in enforcement by itself does not violate constitutional rights, nor does the absence of notice of such an enforcement policy render the statutory scheme impermissibly vague.

The discretion exercised by the commission in enforcement of § 37-1111 by conservation officers did not exceed the statutory authority of the agency. The general rule is that the Legislature may not delegate legislative authority to an administrative agency. The Legislature may authorize an agency to make rules and regulations for the operation and enforcement of a law, such to be limited to rules within the express legislative purpose of the act and to be administered in accordance with standards expressed in the act. *Gillette Dairy, Inc. v. Nebraska Dairy Products Board,* 192 Neb. 89, 219 N.W.2d 214 (1974). No unconstitutional delegation of authority occurs when the Legislature defines a crime and sets a penalty therefor, but delegates the implementation of details to an administrative agency. *State v. Cutright,* 193 Neb. 303, 226 N.W.2d 771 (1975). Nor is it unconstitutional for the manner and method of enforcing a law to be delegated, since of necessity this must be left to the reasonable discretion of administrative officers. *School District No. 39 v. Decker,* 159 Neb. 693, 68 N.W.2d 354 (1955).

In the present case, the purpose of the act is clearly spelled out in Neb. Rev. Stat. § 37-1101 (Reissue 1978): "For the purpose of supplying additional revenue to better accommodate the increasing public use of the Nebraska state park system by providing improved operation and maintenance, the Game and Parks Commission shall require an entry permit to be affixed to motor vehicles which enter areas of the Nebraska state park system which are

designated as permit areas by the commission as provided by sections 37-1101 to 37-1114."

Neb. Rev. Stat. § 37-1112(1) (Reissue 1978) makes a proper delegation of authority to the agency: "The commission may adopt or enact such rules and regulations as are necessary to administer the entry permit program and to carry out the purposes and intents of sections 37-1101 to 37-1114."

The agency, by instituting a policy of enforcement which included warnings and sales by officers in the initial years, and strict enforcement with no permit sales by officers to violators in the later years, carried out the enforcement responsibilities of the agency within the enunciated policy and was within the proper discretion of the agency. No improper delegation has been made.

The defendant contends that because permits are required of only those who enter permit areas by motor vehicle, only drivers are singled out for different treatment not based upon a rational classification. The defendant argues that the fee charged the drivers does not bear substantial relationship to the object of the legislation, i.e., to raise revenue for park maintenance.

In *Ralston v. County of Dawson,* 200 Neb. 678, 681, 264 N.W.2d 868, 870 (1978), we said, " ' "That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy. * * * Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it.". . .' "

The legislative purpose in passing the permit law was to generate revenue for the maintenance and improvement of the Nebraska state park system. § 37-1101. The imposition of the fee on motor vehicles bears a rational relationship to this purpose.

The record indicates most users of the park system enter by motor vehicle and the presence of the vehicles and those who enter in them generate a great portion of the need for improvements and facility maintenance.

We conclude that the judgment of the District Court and the order of the county court were erroneous and the exceptions must be sustained.

EXCEPTIONS SUSTAINED.

STATE OF NEBRASKA, APPELLEE, V. RENEE F. ISHERWOOD, APPELLANT.

330 N.W.2d 495

Filed February 25, 1983. No. 82-375.

1. **Homicide: Sentences.** The effect of a sentence to life imprisonment for second degree murder is an indeterminate sentence of 10 years to life.
2. **Sentences: Appeal and Error.** A sentence within statutory limits will not be disturbed on appeal in the absence of evidence showing an abuse of discretion by the trial court.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Berry, Anderson, Creager & Wittstruck, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

MORAN, D.J.

Defendant, Renee F. Isherwood, was charged with first degree murder. She pleaded guilty to an amended information charging her with second degree murder, and was sentenced to life imprisonment with credit for time in jail awaiting disposition of the case. She appeals, contending that the sentence was excessive. We affirm.

The record and presentence report disclosed that the defendant is a high school graduate who had been an honor student until her senior year. She was 18 years old at the time of the offense and was living with her 28-year-old boyfriend. They were planning to marry when his divorce became final. Her boyfriend was employed and the defendant was caring for his 4-year-old son, who was the victim. The boy had misbehaved and defendant began spanking him, progressed to striking and beating him, and finally strangled the child to death either with her hands or a television cord, or both. There was evidence that the defendant attempted to cover up the crime when she called the police immediately after the event.

Defendant's claim that there was an abuse of discretion centers upon an unblemished prior record and psychiatric testimony indicating that she was suffering from continuing personality problems and depression. She was hospitalized for depression for 3 days approximately 6 months before the crime. Short-term psychiatric therapy was recommended, but the defendant did not undergo therapy. The presentence report discloses that the defendant did not want to care for the child, but her boyfriend demanded she care for the boy as a condition of continuing their relationship. This arrangement caused the defendant considerable stress.

There was considerable disagreement as to the nature of the defendant's mental difficulties. Experts testified for the State and the defense at the hearing conducted under Neb. Rev. Stat. § 29-2027 (Reissue 1979) to determine the degree of the homicide. Experts also submitted their depositions and written reports, which were made a part of the presentence report. The trial judge obviously chose to believe the witnesses for the State, as he had a right to do. Their findings may be summarized as disclosing that the defendant had no ongoing psychosis or neurosis and used passive-aggressive and passive-

dependent types of tactics in relating to others and in carrying out her day-to-day activities. Psychiatric help was believed to be in order.

It is important to note that under our decisions the effect of the sentence imposed is an indeterminate sentence of 10 years to life. *State v. Moore,* 209 Neb. 88, 306 N.W.2d 183 (1981); *State v. McNichols,* 210 Neb. 875, 317 N.W.2d 95 (1982).

A sentence within statutory limits will not be disturbed on appeal in the absence of evidence showing an abuse of discretion by the trial court. *State v. McNichols, supra.*

In this case the evidence would have supported a conviction of first degree murder. The victim was a defenseless child. The injuries inflicted causing death were the result of a brutal, sustained attack. In imposing sentence the trial judge observed that he had considered the mitigating circumstances, that the defendant had underlying problems which needed to be taken care of, and that any other sentence would depreciate the seriousness of the offense to the defendant and to others. We conclude there was no abuse of discretion resulting in an excessive sentence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GLEN A. FORD, APPELLANT.

330 N.W.2d 497

Filed February 25, 1983. No. 82-408.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, for appellant.

Paul L. Douglas, Attorney General, and Sharon M. Lindgren, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

CAPORALE, J.

This case is controlled by our opinion in *State v. Coffman, ante* p. 560, 330 N.W.2d 727 (1983). Defendant-appellant, Glen A. Ford, while a prisoner at the Nebraska Penal and Correctional Complex, was assigned on work release to the Omaha Post Care Center on September 23, 1981. On November 16, 1981, the defendant failed to return to the Omaha Post Care Center and was thereafter arrested, charged, and convicted of escape pursuant to Neb. Rev. Stat. § 28-912 (Reissue 1979).

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID E. STAFFORD, APPELLANT.
330 N.W.2d 739

Filed February 25, 1983. No. 82-556.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, for appellant.

Paul L. Douglas, Attorney General, and Sharon M. Lindgren, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

CAPORALE, J.

This case is controlled by our opinion in *State v. Coffman, ante* p. 560, 330 N.W.2d 727 (1983). Defendant-appellant, David E. Stafford, while a prisoner at the Nebraska Penal and Correctional

Complex, was assigned on work release to the Omaha Post Care Center on September 16, 1981. On December 23, 1981, the defendant failed to return to the Omaha Post Care Center and was thereafter arrested, charged, and convicted of escape pursuant to Neb. Rev. Stat. § 28-912 (Reissue 1979).

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

COMMERCE SAVINGS LINCOLN, INC., A CORPORATION, APPELLEE, V. HUGH P. ROBINSON ET AL., APPELLEES, PAMELA MCNALLY AND STATE OF NEBRASKA, INTERVENORS-APPELLANTS.

331 N.W.2d 495

Filed March 4, 1983. No. 44459.

1. **Mortgages.** A purchase-money mortgage generally takes precedence over all existing and subsequent claims and liens against the mortgagor as to the property sold.
2. _____. A purchase-money mortgage is given for the unpaid purchase money on a sale of land as part of the same transaction as the deed, and its funds are actually used to buy the land.
3. _____. A purchase-money mortgage given to secure a particular debt remains valid in equity for that purchase, whatever form the debt might assume, if it can be traced. The lien of a purchase-money mortgage having attached, it will not be displaced by a change in the form of the security.
4. _____. An additional debt will discontinue the old mortgage only if the parties intended that it do so.
5. _____. As a general rule, the cancellation of a mortgage on the record is not conclusive as to its discharge, or as to the payment of the indebtedness secured thereby. The parties' intention controls and can be shown by extrinsic evidence.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Richard A. Vestecka of Vestecka, Gorham & Tegtmeier, for appellant Pamela McNally.

Knudsen, Berkheimer, Beam, Richardson & Endacott, for appellee Commerce Savings.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

WHITE, J.

This is an action by appellee Commerce Savings Lincoln, Inc., to foreclose a mortgage on two tracts of urban real estate in the city of Lincoln, Lancaster County, Nebraska. Petitioners in intervention and appellants, Pamela McNally and the State of Nebraska, were permitted to intervene and urge the priority of a child support lien over the mortgage on one of the tracts. The trial court determined that the mortgage lien was a substitute purchase-money mortgage and therefore was entitled to priority over the child support lien, and ordered foreclosure. Pamela McNally, the holder of the child support judgment, and her assignee, the State of Nebraska, Department of Welfare, appeal. We affirm.

An understanding of the facts in this case is necessary. Pamela McNally and Marc McNally were divorced in November 1974 and the divorce decree ordered that Marc McNally pay child support and alimony. The evidence presented indicated that Marc failed to make a number of these payments and the same became a judgment lien attaching to any property owned by Marc McNally or any property which might subsequently be acquired by him. *McCord v. McCord,* 128 Neb. 230, 258 N.W. 474 (1935). Marc remarried shortly thereafter and on January 26, 1978, purchased the property at issue at 2504 T Street, Lincoln, Nebraska, from the Whitemans, sellers. The deed was kept in escrow until after the McNallys executed a mortgage to Mutual Savings Company. (Mutual Savings, the predecessor, has been succeeded by and is now known as Commerce Savings Lincoln, Inc., the appellee herein.)

On March 29, 1978, Marc McNally and his new wife, Deanna, signed a note to Mutual Savings for $22,250 and executed a mortgage to secure the note. The note stated that the funds were advanced to pur-

chase the T Street property. The deed conveying from the Whitemans to Marc and Deanna McNally and the mortgage given by the McNallys to Mutual Savings were both recorded on April 6, 1978.

On August 9, 1978, Marc and Deanna McNally conveyed the T Street property, which was still subject to the $22,250 mortgage, to Hugh P. Robinson and Penny L. Robinson, defendants and appellees herein. A month later, September 8, 1978, after buying the T Street property and assuming the existing McNally mortgage, the Robinsons executed a new blanket mortgage to Mutual Savings to consolidate in one note and mortgage their total obligation to Mutual Savings. The blanket note and mortgage were for $69,000 and covered a lot in Boulevard Heights, Lincoln, in addition to the T Street property. Mutual Savings had a preexisting mortgage on both tracts.

On September 11, 1978, Mutual Savings executed a release of the McNally mortgage on the T Street property, and on September 12, 1978, both the new blanket mortgage with the Robinsons and the release of the McNally mortgage were filed. No additional consideration was advanced by Mutual Savings to the Robinsons over the amount previously secured by mortgage on both tracts.

The Robinsons later became in default on the note and blanket mortgage and this foreclosure action was initiated. Among the named defendants were both the Robinsons and the McNallys. Pamela McNally intervened in the action, alleging a priority based upon her child support lien, and sought to obtain priority over the Commerce Savings (formerly Mutual Savings) mortgage.

It is the effect of the execution of the second mortgage by the Robinsons to Mutual Savings and the release of the McNally mortgage on the T Street property which gives rise to the controversy in question. A number of errors are assigned in the trial court's determination, the principal one being that the trial

court erred in not finding that the release of the T Street mortgage moved the preexisting judgment lien of Pamela McNally into a position of priority over the subsequent $69,000 blanket mortgage from the Robinsons to Mutual Savings. The appellants contest the finding that the mortgage given by Marc McNally and wife to Mutual Savings was, in fact, a purchase-money mortgage and, as such, entitled to priority over a judgment. *Omaha Loan & Bldg. Assn. v. Turk,* 146 Neb. 859, 21 N.W.2d 865 (1946); 59 C.J.S. *Mortgages* § 231 (1949). Appellants assert that the Robinson blanket mortgage was not a purchase-money mortgage because the recorded release extinguished both the McNally mortgage and its previous purchase-money status. Thus, appellants are arguing that a release of the previous mortgage and the execution of a new mortgage on a different or additional debt will discontinue the prior mortgage.

Commerce Savings maintains that the original mortgage to the McNallys was a purchase-money mortgage and that the new mortgage only continued the prior mortgage and its purchase-money status.

A purchase-money mortgage generally takes precedence over all existing and subsequent claims and liens against the mortgagor as to the property sold. *Omaha Loan & Bldg. Assn. v. Turk, supra.*

A purchase-money mortgage is given for the unpaid purchase money on a sale of land as part of the same transaction as the deed, and its funds are actually used to buy the land. 59 C.J.S. *Mortgages, supra.* It is clear that the McNallys originally had a purchase-money mortgage. First, the bank gave the mortgage so the McNallys could buy the T Street property. The note accompanying the mortgage stated that the funds were advanced for the purpose of purchasing the T Street property. Second, the mortgage appears to be part of the same transaction as the deed, considering that the deed was held in escrow and not filed until the mortgage had been

executed and filed. Finally, the funds were used to pay off the original sellers or the original sellers' obligation.

Since we find that the McNally mortgage was a purchase-money mortgage, this court applies the general rule, as it did in *Larson Cement Stone Co. v. Redlim Realty Co.,* 179 Neb. 134, 137 N.W.2d 241 (1965), that a release and a new mortgage will continue the original mortgage. In that case Meyer H. Feldman and Redlim Realty executed a note for $300,000 to the bank, secured by a real estate mortgage. Feldman sold his interest, and in order to release him from the original note, Redlim Realty signed a new note and mortgage for the same amount. The bank had released the original mortgage 1 day prior to the new mortgage being signed. Both the release and new mortgage were recorded on the same date. Intervening lienors argued that they had priority over the new mortgage as a result of the release. While not an issue, this court stated the effect of filing a release and accepting a subsequent mortgage: " ' ''And where the holder of a senior mortgage discharges it [the mortgage] of record, and contemporaneously therewith takes a new mortgage, he will not, in the absence of paramount equities, be held to have subordinated his security to an intervening lien unless the circumstances of the transaction indicate this to have been his intention, or such intention upon his part is shown by extrinsic evidence.'' ' '' *Larson Cement Stone Co. v. Redlim Realty Co., supra* at 137, 137 N.W.2d at 244, quoting *Hadley v. Schow,* 146 Neb. 163, 18 N.W.2d 923 (1945).

In *Troyer v. Mundy,* 60 F.2d 818 (8th Cir. 1932), the father sold land to his son-in-law and took back a purchase-money mortgage for $11,000. When the father died the wife of the son-in-law received $6,800 of the mortgage and the father's other daughter received $3,700. To divide the estate, the sisters released the original $11,000 mortgage and took back

two mortgages of equal priority, one for $6,800 and one for $3,700. Thereafter, a third party was willing to advance $3,700 for the one sister's mortgage if he could have a first mortgage. The sisters filed releases and the son-in-law renewed the mortgages, executing a first mortgage to the third party for $3,700 and a second mortgage to his wife for $8,500, which was the amount then due. The son-in-law subsequently was declared bankrupt and the trustee in bankruptcy argued that he had priority because the wife was not entitled to the protection of a purchase-money mortgage.

The *Troyer* court found: "Being a purchase-money mortgage, given to secure a particular debt, it remained valid in equity for that purpose, whatever form the debt might assume, if it could be traced. . . . The lien of a purchase-money mortgage having attached, it was not displaced by any change in the form of the security. Defendant has clearly traced her debt and mortgage to the original purchase-money mortgage, and in equity her purchase-money mortgage interest should be sustained. . . . The subsequent dealings with the original mortgage have not changed the inherent nature of the mortgages taken in its place. They are to be regarded as purchase-money mortgages." *Troyer, supra* at 821.

The present case satisfies the elements necessary for the second mortgage to assume the status of the first. The parties intended the second mortgage to be a continuation of the first one. The real estate broker in charge of the transaction, William King, testified that both he and the loan officer intended that the new mortgage would keep the original mortgage on record. The release and the new mortgage were part of the same transaction. The substitute mortgage was executed September 8, 1978, the release September 11, 1978, and both were filed on September 12, 1978.

The rule that a release and new mortgage con-

tinue the original mortgage applies especially where the transaction "is done in good faith, in ignorance of the intervening lien, and without any intention to release the lien of the mortgage . . . ." 59 C.J.S. *Mortgages* § 281 (1949). King testified that Mutual Savings inadvertently released the mortgage and did not intend to release it. There is also no evidence that Mutual Savings knew of the child support judgment lien. Further, where the interest arose prior to the original mortgage, as did this lien, no reliance existed, and consequently the original mortgage will continue despite the accident or mistake. 59 C.J.S. *Mortgages* § 282 (1949).

The appellants argue that the recorded release is controlling. The cases cited by the appellants do not involve the release and renewal of a mortgage but only a legal effect of filing a release. Nebraska case law states that not the recorded release but rather the intent of the parties controls. *Larson Cement Stone Co. v. Redlim Realty Co.,* 179 Neb. 134, 137 N.W.2d 241 (1965).

Appellants also argue that since there was an additional debt, the rule of *Larson Cement* should not apply. However, an additional debt will discontinue the old mortgage only if the parties intended that. Most illustrative of this point is *United States v. Grover,* 227 F. 181, 184 (N.D. Cal. 1915), where the court stated: "Nor does the including in the new mortgage of an additional indebtedness not covered by the first discharge the lien of the old mortgage, so far as the indebtedness secured thereby remains unpaid, unless such be the purpose of the parties."

The change in the instant case of the interest rate did not change the intentions of the parties. Also, the difference in parties was irrelevant because the subsequent mortgagees were successors in interest and privies in estate with Mutual Savings, who held the mortgage originally.

Appellants also argue that the purchase-money mortgage should attach only to the amount of money

paid to others and not to the amount paid to Marc and Deanna McNally at the time of the original purchase. The evidence is to the contrary. The real estate agent who handled the original transaction where the McNallys acquired title to the property indicated that the money was immediately paid to the Whitemans for their equity in the property over and above the debts owed to others. There was no evidence that the McNallys received any money personally from the mortgage proceeds.

Appellants further assert that the receipt of the evidence with respect to the release, in the form of extrinsic evidence, violates the parol evidence rule. However, in *Larson Cement, supra*, we treated the release as a receipt and stated that, as a general rule, the cancellation of a mortgage on the record is not conclusive as to its discharge, or as to the payment of the indebtedness secured thereby. The parties' intention controls and can be shown by extrinsic evidence. See, also, *Peoples Bank v. Trowbridge,* 123 Neb. 312, 242 N.W. 647 (1932).

The evidence introduced in this case convinced the trial court and this court de novo that it was not the intention of Mutual Savings Company and its successor, Commerce Savings Lincoln, Inc., to release the T Street property from the effects of the mortgage, and the filing of the release was inadvertent. We are convinced that under our cases, notwithstanding the inadvertent filing of the release, the new mortgage continues the prior mortgage and its purchase-money mortgage status, provided the new mortgage is traceable to the original transaction, no intervening equity prohibits the priority of the original purchase-money mortgage, and the intentions of the parties do not indicate otherwise.

Other errors are assigned relating to whether or not Commerce Savings properly pleaded the priority of its purchase-money mortgage status. We will not comment further, other than merely observing that Commerce Savings put in issue by its petition

whether or not the lien it held was the first lien on the subject property. In doing so it placed in issue, for all practical purposes, any status that it may have had concerning the priority of its lien to all other liens. There are other errors assigned but the same are not meritorious and will not be discussed further.

On review de novo, we agree with the judgment of the trial court and it is hereby affirmed.

AFFIRMED.

CLINTON, J., not participating.

NEAL HOLMER, APPELLANT, V. COUNTY OF DOUGLAS, DOUGLAS COUNTY WELFARE ADMINISTRATION, AND STATE OF NEBRASKA, DEPARTMENT OF PUBLIC WELFARE, APPELLEES.

330 N.W.2d 746

Filed March 4, 1983. No. 81-736.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Mark A. Klinker, for appellant.

John J. Reefe, Jr., for appellees Douglas County and Douglas County Welfare Administration.

Paul L. Douglas, Attorney General, and Royce N. Harper, for appellee State Department of Public Welfare.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

This is an appeal by a merit system employee from an order discharging him from his employment by the Douglas County Welfare Administration for cause.

Upon review de novo we find no prejudicial error

in the record. The judgment of the District Court is therefore affirmed.

AFFIRMED.

CLINTON, J., not participating.

JIM SNYDER, DOING BUSINESS AS JIM SNYDER DRILLING COMPANY, APPELLEE, V. DALE NELSON, APPELLANT.

331 N.W.2d 252

Filed March 4, 1983. No. 81-746.

1. **Summary Judgment.** Summary judgment may be properly granted where there exists no genuine issue as to any material fact in the case, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law.
2. **Records: Appeal and Error.** Assignments of error requiring an examination of the evidence are not available on appeal in the absence of a bill of exceptions, the bill of exceptions being the only vehicle for bringing evidence to this court. This remains so even though certain evidence has been physically filed in the office of the clerk of the trial court.
3. _____: _____. Where there is no bill of exceptions, we are limited to an examination of the pleadings; if they are sufficient to support the judgment, we will not reverse the trial court.
4. _____: _____. Where there is no bill of exceptions, it will be presumed on appeal that the evidence supports the trial court's judgment.
5. **Foreign Judgments.** Where the party against whom registration of a foreign judgment is sought appears in the proceeding, evidence has been taken, and there is no bill of exceptions, strict compliance with the statutory requirements relative to authentication as to subsequent entries affecting the judgment is not required.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Affirmed.

John D. Sykora, for appellant.

John B. Ashford of Bradford, Coenen & Ashford, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ.

CAPORALE, J.

Dale Nelson, defendant below, appeals from the granting of summary judgment to plaintiff-appellee, Jim Snyder, doing business as Jim Snyder Drilling Company, registering the latter's Colorado judgment in the principal sum of $20,934.64. We affirm.

The appellant Nelson contends the Nebraska trial court erred, first, in finding that the Colorado court had personal jurisdiction over his person and, second, in determining there were no disputed material facts such as would preclude decision of the case as a matter of law.

Summary judgment may be properly granted where there exists no genuine issue as to any material fact in the case, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law. *First National Bank v. Rose, post* p. 611, 330 N.W.2d 894 (1983); *Mutual Benefit Life Ins. Co. v. Chisholm, ante* p. 301, 329 N.W.2d 103 (1983); *Stolte v. Blackstone, ante* p. 113, 328 N.W.2d 462 (1982); *Oehlrich v. Gateway Realty of Columbus, Inc.*, 209 Neb. 417, 308 N.W.2d 327 (1981); *Metro. Tech. Community College v. South Omaha Industrial Park,* 207 Neb. 472, 299 N.W.2d 535 (1980). It is in accordance with the foregoing rule that we must test this case.

Although it is appellant's responsibility to see that a bill of exceptions is filed in this court (see Neb. Ct. R. 5C(5) (Rev. 1982)), Mr. Nelson, for whatever reason, has elected to not so favor us. There is, consequently, no evidence for us to review. It appears we most recently addressed this problem with respect to motions for summary judgment in *DeCosta Sporting Goods, Inc. v. Kirkland,* 210 Neb. 815, 816, 316 N.W.2d 772, 774 (1982), wherein we stated: "In order to receive consideration on appeal, any affidavits used on a motion for summary judgment must have been offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. . . . Included within the transcript is an

affidavit . . . and a copy of a petition . . . . However, neither of these items was received in evidence . . . they do not form a part of the bill of exceptions, and under the rule cited above may not be considered on appeal." It has long been the rule that assignments of error requiring an examination of the evidence are not available on appeal in the absence of a bill of exceptions, the bill of exceptions being the only vehicle for bringing evidence to this court. This remains so even though certain evidence has been physically filed in the office of the clerk of the trial court. *Hanson v. Hanson,* 198 Neb. 675, 254 N.W.2d 699 (1977); *Hubbell v. Farmers Ins. Group,* 200 Neb. 472, 263 N.W.2d 863 (1978); *Bulger v. McCourt,* 179 Neb. 316, 138 N.W.2d 18 (1965). See, also, Neb. Ct. R. 5A(2) (Rev. 1982), formerly rule 7.d.2. (Rev. 1977).

We are limited, therefore, to an examination of the pleadings; if they are sufficient to support the judgment, we will not reverse the trial court. *Nimmer v. Nimmer,* 203 Neb. 503, 279 N.W.2d 156 (1979); *Hubbell v. Farmers Ins. Group, supra.* Moreover, where there is no bill of exceptions, it will be presumed on appeal that the evidence supports the trial court's judgment. *Tedco Development Corp. v. Overland Hills, Inc.,* 205 Neb. 194, 287 N.W.2d 49 (1980); *Schroeder v. Homestead Corp.,* 171 Neb. 792, 107 N.W.2d 750 (1961), *cert. denied* 368 U.S. 32, 82 S. Ct. 146, 7 L. Ed. 2d 90.

Appellee Snyder filed a petition pursuant to the Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. §§ 25-1587 et seq. (Reissue 1979). The petition, filed July 28, 1980, alleged the Colorado judgment, alleged the date of its entry, alleged the amount of the judgment, alleged that there were no subsequent entries affecting it, and prayed for its registration. In his answer appellant Nelson denied the operative allegations of the petition, including the allegation that there had been no subsequent entries affecting the judgment, and alleged a myriad

of defenses and purported defenses. He also counterclaimed, praying, among other things, for return of the interest he had paid on the underlying promissory note, in one cause of action, and for sundry damages, in the second cause of action. The judgment of the Nebraska trial court recites that the matter was heard "upon the Motion of the Plaintiff for summary judgment, the pleadings in the case, the evidence submitted in support of and in opposition of said motion for summary judgment and the Court being fully advised in the premises finds that a judgment was entered against Defendant and in favor of Plaintiff on April 18, 1980 by the District Court for the City and County of Denver, State of Colorado, in the amount of $20,934.64, with interest at the rate of 8% per annum from April 18, 1980, plus Plaintiff's costs incurred in said proceeding in the amount of $195.60 and the Court further finds that the Plaintiff is entitled to have said foreign judgment registered in the District Court of Saunders County, Nebraska."

In order to answer the question as to whether appellee Snyder's petition supports the Nebraska trial court's judgment of registration, we must look to the requirements found in § 25-1589. That statute provides: "A petition for registration shall set forth a copy of the judgment to be registered, the date of its entry and the record of any subsequent entries affecting it, such as levies of execution, payments in partial satisfaction, and the like, all authenticated in the manner authorized by the laws of the United States or of this state, and a prayer that the judgment be registered. The clerk of the registering court shall notify the clerk of the court which rendered the original judgment that petition for registration has been made, and shall request him to file this information with the judgment."

The certificates of the Colorado court authenticate the April 18, 1980, judgment as of May 13, 1980, and recite that the copy is a "true, complete and perfect

copy of [the] Judgment Order had and entered . . . as the same now remains on file and of record . . . ." The certificates make no statement with respect to "any subsequent entries affecting" the judgment, as required by the language of § 25-1589. Nor does the record before us establish that the clerk of the Nebraska District Court, Fifth Judicial District, Saunders County, fulfilled the requirements imposed upon her by the provisions of § 25-1589.

The pivotal issue, therefore, is whether the record as it stands before us, notwithstanding its failure to contain an authenticated statement as to subsequent events affecting the Colorado judgment and its failure to establish that the Nebraska trial court's clerk fulfilled her statutory duties, is sufficient to support the judgment of registration.

The briefs of counsel refer us to no case on this issue. However, *Holley v. Holley,* 264 Ark. 35, 568 S.W.2d 487 (1978), is apposite. The petition filed therein under the Uniform Enforcement of Foreign Judgments Act, as adopted by Arkansas, alleged that there had been no entries affecting the judgment sought to be registered, but the authenticating certificates were silent in that regard. Neither did the record before the appellate court reveal whether the clerk of the registering court requested from the court entering the judgment the information required by the Arkansas statute. The Arkansas Supreme Court concluded that the failure to strictly comply with the statutory requirements governing the contents of a petition for registration of a foreign judgment as to subsequent entries did not totally deprive the trial court of jurisdiction of the proceeding for registration where the party against whom registration was sought was personally served and responded. No contention was made in *Holley* that the failure of the record to reveal whether the clerk of the registering court had fulfilled his duties was jurisdictional, and the court therefore did not address that issue. It did observe, however, that if the

allegation of the petition with regard to subsequent entries was not correct, the action to register the judgment could have been used to disclose the truth of the matter. The Arkansas Supreme Court further reasoned that by filing a counterpetition seeking affirmative relief, the party against whom registration was sought had waived all objections to the Arkansas trial court's jurisdiction over the controversy between the parties. See, also, *Concannon v. Hampton,* 584 P.2d 218 (Okla. 1978), holding that authentication is evidentiary, not jurisdictional.

It seems to us the reasoning of the Arkansas court is sound. Admittedly, *Holley* is distinguishable from this case in that the effect of the failure of the registering court's clerk to comply with the statute was not at issue. Since we must determine the sufficiency of Mr. Snyder's petition to support the judgment, the question is at issue here. Further, in *Holley* the allegation that there had been no subsequent entries was not denied, whereas Mr. Nelson has denied that allegation. Nonetheless, the overriding rationale of *Holley,* it seems to us, is that where the party against whom registration is sought appears in the proceeding, strict compliance with the statutory requirements is not required. We conclude that rationale is sound, at least where evidence has been taken and there is no bill of exceptions. We so hold with respect to a silent record on the question of the clerk's diligence and the lack of authentication with respect to subsequent entries affecting the judgment.

The brief of appellant Nelson assures us that his "cross-petition" was dismissed by the trial court. That may be, but the judgment contained in the record before us makes no mention of Mr. Nelson's cross-petition; in fact it reflects that Mr. Snyder's demurrer to the second cause of action is still under advisement. In any event, those matters are not properly before us.

The judgment of the trial court registering Mr. Snyder's Colorado judgment is affirmed.

AFFIRMED.

FIRST NATIONAL BANK OF HAYES CENTER, APPELLANT, V. VINCENT W. ROSE AND LUCILE I. ROSE, HUSBAND AND WIFE, APPELLEES.

330 N.W.2d 894

Filed March 4, 1983. No. 81-772.

1. **Uniform Commercial Code: Security Interests.** When the collateral consists of goods purchased by the debtor, the sales article of the Uniform Commercial Code determines when the debtor has acquired rights in the collateral.
2. _____: _____. A land contract vendee has an equitable interest in the land.
3. **Summary Judgment.** Summary judgment should be granted where the pleadings, together with the depositions and affidavits received in evidence, show there is no genuine issue as to any material fact and establish that the movant is entitled to judgment as a matter of law.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Reversed and remanded with directions.

Murphy, Pederson, Piccolo & Anderson, for appellant.

Schneider & Nisley, P.C., for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

CAPORALE, J.

Plaintiff-appellant, First National Bank of Hayes Center (Bank), appeals from the denial of its motion for summary judgment and the granting of the motion for summary judgment filed by defendants-appellees, Vincent W. Rose and Lucile I. Rose, husband and wife. We reverse.

The plaintiff Bank urges the trial court erred in determining that its security interest did not attach to the items in question prior to the time they became fixtures and therefore did not defeat the Roses' claim to such items.

The Roses sold a 1,200-acre farm to Mr. and Mrs. Cary W. Leonard pursuant to a land contract dated April 23, 1976. The Leonards paid the Roses $80,000 toward the purchase price of $330,000. Subsequently, Mr. Leonard arranged with Sargent Irrigation Company for the drilling and installation of an irrigation well with pertinent equipment, including the items in question: a pump, bowl, well column, and gear head. On or about April 27, 1976, Mr. Leonard signed a promissory note, a financing statement, and a security agreement in favor of the Bank in exchange for a loan of $54,000. The financing statement and security agreement each covered, among other things, all farming and irrigation equipment. The financing statement was filed in the office of the Lincoln County clerk on April 29, 1976, but the security agreement was not filed in the office of the Lincoln County register of deeds until September 18, 1979. According to Mr. Rose, the well was drilled in April 1976 and the items in question were delivered to the farm and installed during the spring of 1977. Because the Leonards were unable to meet the payment schedule set forth in the land contract, they and the Roses, on or about July 21, 1978, entered into an agreement modifying the land contract. Under the terms of this modification agreement the Leonards paid $15,580 rather than the $23,420 due May 1, 1978; agreed that if the revised payment schedule was not met on November 1, 1978, the Roses were to keep all payments previously made to them; the quitclaim deed executed by the Leonards would be delivered by the escrow agent to the Roses; and the Leonards would vacate the property on or before March 1, 1979. The Leonards defaulted and the quitclaim deed was delivered to the Roses during the first part of November 1978; the Roses took possession of the land on which the well was located on or about March 1, 1979. An effort by Sargent Irrigation Company during the latter part of November 1978 to pull out the pipe was successfully

thwarted by Mr. Rose. Thereafter, the plaintiff Bank brought this action to replevin the items in question and to recover damages. Subsequently, the Bank moved for a summary judgment that it was entitled to possession of the items in question. That motion was overruled by the trial court. The Roses also filed a motion for summary judgment, the precise nature of which we cannot determine because, although the Bank's praecipe calls for such, it is not found in the transcript. However, the Roses' notice of hearing on a summary judgment motion and the judgment from which the plaintiff Bank appeals are contained in the transcript. That judgment dismisses all of the Bank's claims relevant to this appeal against the Roses.

The rights of the parties are controlled by the Uniform Commercial Code as adopted in Nebraska. The first question to be determined is when plaintiff Bank acquired a security interest in the items in question. Neb. U.C.C. § 9-204(1) (Reissue 1971), now found generally at Neb. U.C.C. § 9-203(1) (Reissue 1980), provided then as follows: "A security interest cannot attach until there is agreement (subsection (3) of section 1-201) that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching."

The agreement element was met by the execution of the security agreement on April 27, 1976. The value requirement was met by the plaintiff advancing to Mr. Leonard the amount of the loan. Therefore, the only element which remains for consideration is at what time the debtor Leonard acquired rights in the collateral, for that is the time which determines when plaintiff's security interest "attached," that is to say, came into existence. Although there is dictum in *Tillotson v. Stephens,* 195 Neb. 104, 237 N.W.2d 108 (1975), which may suggest otherwise, when the collateral consists of goods pur-

chased by the debtor, the sales article of the Uniform Commercial Code determines when the debtor has acquired rights in the collateral. *In re King-Porter Company,* 446 F.2d 722 (5th Cir. 1971). *Tillotson* was concerned not with the question of when a security interest attached but, rather, with the priority of claims as between parties to a conditional sales contract and a subsequent purchaser of realty for value.

Neb. U.C.C. § 2-401 (Reissue 1980) provides, as it did at the time in question: "Each provision of this article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. . . .

"(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

"(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place . . . ."

Since the items in question could not be affixed to the realty until after delivery, even if installation were to have taken place immediately thereafter, it necessarily follows that in this instance plaintiff's

security interest came into existence prior to the time the items were attached to the realty and thus became fixtures. See, also, *Wood Chevrolet Co. v. Bank of the Southeast,* 352 So. 2d 1350 (Ala. 1977), holding that delivery controlled when title passed to certain automobiles.

The foregoing conclusion makes necessary that we determine the priority between plaintiff's claim and the Roses' claim. Although a number of amendments became effective on July 19, 1980, at the time material herein Neb. U.C.C. § 9-313 (Reissue 1971) provided in pertinent part as follows:

"(2) A security interest which attaches to goods before they become fixtures takes priority as to the goods over the claims of all persons who have an interest in the real estate except as stated in subsection (4).

. . . .

"(4) The security interests described in subsections (2) and (3) do not take priority over (a) a subsequent purchaser for value of any interest in the real estate; or (b) a creditor with a lien on the real estate subsequently obtained by judicial proceedings; or (c) a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances if the subsequent purchase is made, the lien by judicial proceedings is obtained, or the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the real estate at a foreclosure sale other than an encumbrancer purchasing at his own foreclosure sale is a subsequent purchaser within this section." Accordingly, plaintiff's security interest takes priority over the claim of the Roses unless the Roses come within any one of the exceptions contained in § 9-313(4). They clearly obtained no subsequent lien by judicial proceedings. Nor did they make any subsequent advances; the evidence establishes that the Leonards made a payment to

the Roses in exchange for a modification of the land contract. The question then becomes solely whether the Roses are subsequent purchasers for a value. The delivery of the quitclaim deed to them did not create in them any interest in the realty which they did not already own. It merely terminated the equitable lien of the Leonards in the realty, who had in fact lost such by being in default. Delivery of the quitclaim deed simply fulfilled the bargained-for procedural shortcut to clear the Roses' title in and to the land. See *O'Hara Plumbing Co., Inc. v. Roschynialski,* 190 Neb. 246, 207 N.W.2d 380 (1973), holding that a land contract vendee has an equitable interest in the land. Unlike the purchaser at the foreclosure sale in *Tillotson v. Stephens,* 195 Neb. 104, 237 N.W.2d 108 (1975), the Roses were not subsequent purchasers for value; consequently, the security interest of the plaintiff Bank is superior to the claim of the Roses. See, also, § 9-313, Comment 3, which states: "Where a security interest in the goods as chattels has attached before affixation, subsection (2) gives the secured party priority over all prior claims based on an interest in the realty. If the secured party perfects his interest by filing, which he may do in advance of affixation, he takes priority over subsequent realty claims as well. So long as he fails to perfect his interest he may, however, be subordinated to the subsequent claimants described in subsections (4) (a), (b) and (c). The last sentence of subsection (4) on purchasers at foreclosure sales clarifies a point on which prior decisions have been in conflict."

Each party filed a motion for summary judgment. The pleadings, together with the depositions and affidavits received in evidence, show there is no genuine issue as to any material fact and establish that the plaintiff Bank, rather than the Roses, is entitled to judgment as a matter of law. Under such circumstances the plaintiff Bank's motion for partial summary judgment should have been sustained and

the motion of the Roses overruled. *Mutual Benefit Life Ins. Co. v. Chisholm, ante* p. 301, 329 N.W.2d 103 (1983); *Johnsen v. Harper, ante* p. 145, 328 N.W.2d 192 (1982).

The judgment of the lower court in favor of the defendants Rose dismissing the claim of the plaintiff Bank is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MAX L. BIEGERT AND THELMA BIEGERT, HUSBAND AND WIFE, AND BIEGERT BROTHERS FARMS, INC., A NEBRASKA CORPORATION, APPELLANTS, V. THELMA DUDGEON, NAOMI D. BETTY, AND WILLARD B. DUDGEON, APPELLEES.

330 N.W.2d 897

Filed March 4, 1983. No. 81-775.

1. **Easements.** A prescriptive right is not looked upon with favor and, generally, must be proved by clear, convincing, and satisfactory evidence.
2. **Easements: Proof.** The party claiming a prescriptive right to an easement must prove that his use and enjoyment was adverse, under a claim of right, continuous and uninterrupted, open and notorious, and exclusive for the full prescriptive period.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Reversed and remanded with directions.

Daniel E. Bryan of Heinisch & Bryan, for appellants.

Koenig & Murray, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

KRIVOSHA, C.J.

This is an action instituted by the appellants, Max Biegert, Thelma Biegert, and Biegert Brothers

Farms, Inc. (Biegerts), seeking to establish a prescriptive easement over a 30-foot strip of land owned by the appellees, Thelma Dudgeon, Naomi D. Betty, and Willard B. Dudgeon (Dudgeons), for the use of planting, harvesting, and caring for crops. Biegerts also sought an order requiring the Dudgeons to remove a fence constructed by the Dudgeons in such a manner as to prevent the Biegerts from coming upon the land over which the easement was being sought, and a permanent injunction to prevent future interference with the use of the land. The trial court sustained a motion to dismiss made by the Dudgeons and, following the overruling of a motion for new trial, the Biegerts appealed to this court. Their principal assignment of error is that the trial court erred in failing to find that they had established a prescriptive easement over the strip of land in question for use as a turnrow. We believe that the Biegerts are correct and therefore reverse the decision of the trial court.

The evidence discloses that the Biegerts and the Dudgeons are record owners of adjacent tracts of land once owned by the parties' grandparents and thereafter acquired by each of them. The Biegerts own and operate a farm on the north half of the northwest quarter of Section 28, Township 5 North, Range 3 West of the 6th P.M., Fillmore County, Nebraska. The Dudgeons are the owners of the south half of the northwest quarter of Section 28, Township 5 North, Range 3 West of the 6th P.M., Fillmore County, Nebraska. Prior to 1979 neither party knew where the exact boundary line was located between the north and south portions of the northwest quarter in question. The only visible division between the two tracts prior to this time was a well-defined drainage ditch approximately 20 feet in width. The ditch, which began at the west boundary line, ran in an east-west direction across approximately two-thirds of the quarter section, at which point it turned in a northeasterly direction. The division line which

extended to the eastern line of the northwest quarter from the point where the ditch turned to the northeast was a strip of land equal in width to the drainage ditch. Both the drainage ditch and the strip of land were used as turnrows.

The evidence is without dispute that the Biegerts and their tenants had used the ditch and strip of land as turnrows continuously since at least 1957, and well in excess of 10 years. The Biegerts or their tenants would plant crops to the northern edges of the ditch and strip of land and then turn their equipment in the ditch or on the strip of land.

On November 7, 1979, the Dudgeons had their farm surveyed and determined the exact location of the northern boundary. Based upon this survey, they erected a barbed wire fence on the boundary line between their farm and the land owned by the Biegerts. The fence was constructed on a line parallel to and approximately 10 feet north of the northern edge of the ditch and strip of land in question, thus preventing the Biegerts from using the ditch and adjacent strip of land as turnrows. The testimony of Dudgeons' tenant, Paul Row, established that the use of the area as turnrows by the Biegerts was of such a nature and frequency as to give notice to the Dudgeons. It was further undisputed that the drainage ditch and accompanying strip were used solely as turnrows since at least 1957 and were used by no one other than the Biegerts or their tenant for more than 10 years prior to 1970, when Row also began using the area to turn around. The evidence clearly established that, prior to the survey conducted in 1979, the true boundary line between the two tracts was unknown and that the Biegerts used the land in question under the belief that they were using their own land. One of the appellees, Naomi Betty, specifically testified that the Biegerts were never given permission to use the strip of land as a turnrow.

This being an equity action, it is the duty of this

court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings made by the District Court. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Sturm v. Mau,* 209 Neb. 865, 312 N.W.2d 272 (1981); *Weiss v. Meyer,* 208 Neb. 429, 303 N.W.2d 765 (1981). The question therefore presented to this court is whether we can find from the evidence that the Biegerts have established their right to a prescriptive easement over the 30 feet in question. We are not unmindful of the fact that in reaching our conclusion we are bound by the rule that a prescriptive right is not looked upon with favor and, generally, must be proved by clear, convincing, and satisfactory evidence. *Hengen v. Hengen,* 211 Neb. 276, 318 N.W.2d 269 (1982); *Sturm v. Mau, supra.* Further, in order to establish a prescriptive easement, the individual making the claim must prove substantially the same elements as are required for one to establish a claim of right by adverse possession. That is, the party claiming a prescriptive right to an easement must prove that his use and enjoyment was adverse, under a claim of right, continuous and uninterrupted, open and notorious, and exclusive for the full prescriptive period. *Masid v. First State Bank, ante* p. 431, 329 N.W.2d 560 (1983); *Svoboda v. Johnson,* 204 Neb. 57, 281 N.W.2d 892 (1979).

We have previously held that a use is adverse and under a claim of right if the claimant proves uninterrupted and open use for the necessary period without evidence to explain how the use began. Once this presumption is established, it will prevail unless the owner of the subservient estate is able to show by a preponderance of the evidence that the use was by license, agreement, or permission. *Svoboda v. Johnson, supra; Fischer v. Grinsbergs,* 198 Neb. 329, 252 N.W.2d 619 (1977). This the Dudgeons were unable to do. The evidence further established that the use of the land by Biegerts was

continuous and uninterrupted for more than 10 years, having begun sometime in 1955. That it was not used each day is of no moment. We have previously addressed that issue in *Weiss v. Meyer,* 208 Neb. 429, 433, 303 N.W.2d 765, 768 (1981), when we said: "The law does not require that possession shall be evidenced by a complete enclosure, nor by persons remaining continuously upon the land and constantly from day to day performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be in its nature adapted. [Citations omitted.]" As the evidence disclosed, the 30-foot area in question was used whenever it was necessary for the Biegerts to bring their equipment upon the land and to turn around.

Certainly, no one can argue from the evidence that the use was not open and notorious. It would be difficult to imagine how one would not observe the farm machinery being used on this land, and, as we have already noted, Dudgeons' tenant, Row, confirmed this fact. That the use was exclusive within the meaning of the law is likewise clear. The use of the ditch and adjoining strip was not dependent upon anyone else being present. In *Jurgensen v. Ainscow,* 155 Neb. 701, 710, 53 N.W.2d 196, 201 (1952), we said: "The term 'exclusive use,' however, does not mean that no one has used the driveway except the claimant of the easement. It simply means that his right to do so does not depend upon a similar right in others." And certainly the evidence established that the use was under a claim of right. Before the survey was taken there was a belief that the land in question was owned by the Biegerts. That they were mistaken in their belief is of no consequence. In *Weiss v. Meyer, supra* at 432-33, 303 N.W.2d at 768, we said: "The intent, even though mistaken, is sufficient as where the claimant occupies to the wrong line believing it to be the true line and even though he does not intend to claim more land than that

described in the deed. . . . It is the nature of the hostile possession that constitutes the warning [to the real owner], not the intent of the claimant when he takes possession."

In summary, then, the Biegerts have, by clear, convincing, and satisfactory evidence, established that their use and enjoyment of the property in question was adverse, under a claim of right, continuous and uninterrupted, open and notorious, and exclusive for the full prescriptive period. Having established all of the necessary elements of their cause of action by clear, convincing, and satisfactory evidence, they were entitled to have a prescriptive easement over the 30-foot area in question established in their name. The decision of the trial court must therefore be reversed and the cause remanded with directions to enter judgment in favor of the Biegerts and against the Dudgeons in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MORAN, D.J., dissents.

CEDARS CORPORATION, APPELLANT, V. SUN VALLEY DEVELOPMENT COMPANY ET AL., APPELLEES.

330 N.W.2d 900

Filed March 4, 1983. No. 81-809.

1. **Judgments: Res Judicata.** Where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.
2. **Collateral Estoppel.** It is now generally held that collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed.

John D. Sykora, for appellant.

Frederick S. Cassman of Abrahams, Kaslow & Cassman, for appellees.

KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

KRIVOSHA, C.J.

The appellant in this case, Cedars Corporation, apparently encouraged by the adage, "If at first you don't succeed, try, try again," has once again filed suit against the appellees, Sun Valley Development Company, Willard I. Friedman, and Valley Ho Corporation (hereinafter jointly referred to as Sun Valley), and Howard Kaplan, seeking to have set aside a certain assignment of an agreement to manage a joint venture and to obtain an accounting for alleged profits due to Cedars Corporation and withheld by Sun Valley. The trial court sustained Sun Valley's motion to dismiss. We affirm.

This is the fourth time that Cedars Corporation has, in one manner or another, sought to sue Sun Valley or its various stockholders for damages allegedly incurred by Cedars Corporation and its principal stockholder, Edward E. Milder. The first of such cases is reported in the case of *Cedars Corp. v. H. Krasne & Son, Inc.*, 189 Neb. 220, 202 N.W.2d 205 (1972) (*Cedars I*). In addition to *Cedars I* and the present action, two suits were filed in the District Court of Douglas County, Nebraska, and found as *Cedars Corporation v. Sun Valley Development Co.*, Doc. 658, No. 292, and *Cedars Corporation v. Sun Valley Development Co. et al.*, Doc. 745, No. 298. The present action filed by Cedars (*Cedars IV*) seeks to have set aside a certain assignment of an agreement for management of a joint venture. The management agreement was entered into by the various individuals to this lawsuit and thereafter assigned by the Friedmans to Valley Ho Corpo-

ration, a corporation owned and operated by the Friedmans. By the present action, Cedars maintains that the assignment was not executed on the date shown on the face of the assignment but, in fact, was executed 2 years later, in 1962. Paragraph 10 of the latest petition provides as follows: "That such assignment was never approved by, and constitutes a fraud upon, Plaintiff, as such has deprived it of revenues due it pursuant to the terms of the joint venture with respect to homes constructed on the tract referenced in ¶ 7."

Sun Valley and Kaplan filed a demurrer to the petition on two grounds. The first ground was that the assignment which Cedars sought to have declared void and which formed the basis of the action was executed, even by Cedars' claim, more than 19 years before the suit in question was commenced. For that reason Sun Valley maintained that the action was barred by the statute of limitations. The second ground for the demurrer was that the petition attempted to raise matters which had already been determined between the parties in *Cedars I* and was therefore res judicata. For reasons which are not set out, the trial court overruled the demurrer. Sun Valley then filed a document entitled "Motion to Dismiss." For reasons not explained, Kaplan was not a party to the motion. While entitled a motion to dismiss, it was in fact identical to the demurrer previously filed. Following a brief evidentiary hearing, at which time Sun Valley merely asked the court to take judicial notice of *Cedars I, II, and III,* the trial court sustained the motion and dismissed the action as to Sun Valley.

On appeal to this court Cedars now argues that, because there is no such pleading as a motion to dismiss, the trial court should not have sustained Sun Valley's motion and dismissed the action. Moreover, Cedars argues that there are fact questions which must be resolved before an order can be entered by the court. We do not agree. Regard-

less of what the document may have been entitled, it was in fact a demurrer and we treat it as such.

The sole basis for Cedars' action in this case, as framed by its petition, is that in 1962 the Friedmans assigned the Sun Valley Development Company joint venture management agreement to their corporation Valley Ho. No allegation is made in the petition that Cedars was unaware of that assignment or did not learn of it until some subsequent time. Therefore, on its face, it appears that the cause of action, if indeed it existed, accrued at the latest in 1962. Cedars was therefore required to commence this action for alleged fraud within 4 years after that date or be forever barred. See, Neb. Rev. Stat. § 25-207 (Reissue 1979); *Hollenbeck v. Guardian Nat. Life Ins. Co.*, 144 Neb. 684, 14 N.W.2d 330 (1944). If Cedars was to avoid the effect of the statute of limitations, it was incumbent upon Cedars to both plead and prove some exception which would have thereby tolled the statute of limitations until some later date. *Jones v. Johnson v. Pullen,* 207 Neb. 706, 300 N.W.2d 816 (1981); *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979). Sun Valley's first claim in both its demurrer and its motion to dismiss was correct and should have been sustained by the trial court.

A further and more serious defect in Cedars' petition is raised by the second paragraph contained in both Sun Valley's demurrer and in its motion to dismiss. It is clear that Cedars' claim for relief in the present action is founded upon some notion that the assignment was invalid and that Cedars is entitled to an accounting for profits derived as a result of the construction of homes upon certain land owned by the joint venture. That is precisely what we told Cedars it was not entitled to in *Cedars I, supra* at 227-32, 202 N.W.2d at 209-11, when we said, "Approximately 6 months after the management agreement was signed, the Friedmans assigned it to Valley Ho Corporation, which was owned and operated by

them. The management agreement contained a provision against assignment without written permission. No written permission was obtained. The evidence is conclusive, however, that Milder [Cedars] participated in the assignment; the parties were aware of it; and no objection was raised to it until more than 7 years later. We find the *parties* acquiesced in it and are now estopped to question the absence of written permission.

. . . .

"For more than 7 years Edward E. Milder, the sole owner of Cedars Corporation, the plaintiff, as the accountant for the Friedmans and their corporations, as well as the Sun Valley Development Company, prepared income tax returns for the Friedmans and had them pay the income tax on the house profits. He also prepared income tax returns for the joint venture and made the accountant statement expressing his opinion that all money and accounts were handled by proper accounting procedures. His explanation as to the consistency of his conduct with his present contention is not too convincing.

. . . .

". . . To avoid further litigation the books of the joint venture should be balanced and audited by a certified public accountant for the period of the joint venture to date, and a copy of this report furnished to each of the participants in the venture. This audit is to be only of the joint venture. *It does not include the construction and sale of houses which we have determined are no part of the joint venture.* It should include all other items incident to the development and sale of the land." (Emphasis supplied.)

In *Cedars I* we granted to each of the parties the right to obtain the audit which Cedars now seeks in this action, provided that if the audit was not furnished within 90 days after the issuance of the mandate, an action could be brought by any of the parties, including Cedars. That was on November 17, 1972. Even if the audit has not been provided as

required by us, the time for enforcing that order is now long since past. There is simply no question that the basis for Cedars' action in the instant case was disposed of by us in *Cedars I.* Cedars argues that this matter cannot be disposed of absent a trial and that the court cannot consider the previous cases, including *Cedars I.* "[W]here cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action." *Peterson v. The Nebraska Nat. Gas Co.,* 204 Neb. 136, 138, 281 N.W.2d 525, 527 (1979).

In *Borland v. Gillespie,* 206 Neb. 191, 198, 292 N.W.2d 26, 31 (1980), we said: " 'It is now generally held that collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action.' " See, also, *Reeves v. Watkins,* 208 Neb. 804, 305 N.W.2d 815 (1981). Whether the judgment in *Cedars I* constitutes res judicata in this action or is more properly characterized as collateral estoppel is of little moment. The result is the same. Cedars has had its day in court and cannot continue to maintain frivolous and vexatious suits by merely rearranging the parties or changing their names. The action of the trial court was correct and the judgment dismissing the action is affirmed.

AFFIRMED.

SILVERMAN & SILVERMAN, A PARTNERSHIP, APPELLANT, V. ARBOR STREET PARTNERSHIP, A PARTNERSHIP, APPELLEE.

330 N.W.2d 904

Filed March 4, 1983. No. 81-821.

1. **Contracts: Parol Evidence.** Parol evidence is not admissible to add to, contradict, or vary the terms of a written contract.
2. **Contracts: Evidence.** Where negotiations between the parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Bruce H. Brodkey of Garber & Batt, for appellant.

Jeffrey A. Silver, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

This case arises out of a controversy concerning a lease of office space. The plaintiff is a partnership whose partners are engaged in the practice of law. The defendant is the owner of an office building at 2437 South 130th Circle, Omaha, Nebraska.

On February 25, 1980, the plaintiff entered into a written lease for office space in the defendant's building. The lease was the result of negotiations extending over a period of more than a month. The form of lease originally submitted to the plaintiff was unsatisfactory. The instrument finally executed was a form lease used by the defendant which was modified by a "rider" drafted by the plaintiff.

At the time the parties entered into the lease the office building was under construction. The space adjacent to the plaintiff's office was unfinished because the defendant had not yet secured a tenant for that space. The grounds surrounding the building had not been sodded or landscaped.

The plaintiff moved into the building shortly before May 1, 1980, the date upon which the term of the lease commenced. Instead of a hallway leading to the plaintiff's office, there was a large open space which was unfinished. A wall to complete the hallway was not constructed for approximately a year. Some sod was placed around the building about 6 months after the plaintiff moved in, but no landscaping was done. The areas which had not been sodded were allowed to grow up in weeds. The plaintiff also complained about the cleaning in and around the building and the maintenance of the parking lot.

This action was commenced September 5, 1980, to recover damages alleged to have resulted from the defendant's failure to perform the lease. The amended petition alleged that the "parties contemplated and agreed" to the construction and wallpapering of a hallway; that the parties had agreed that the premises would be attractively landscaped in the spring of 1980; that the defendant failed to clean and maintain the common areas and permitted the grounds to become overgrown with noxious weeds; and that the building and grounds had an unkempt and incomplete appearance. The plaintiff prayed for damages for the difference between the rent reserved in the lease and the actual fair rental value, loss of profits, and "extreme embarrassment and humiliation and mental anguish to the plaintiff together with the loss of goodwill in the community."

At the close of the plaintiff's evidence the trial court sustained the defendant's motion to dismiss. The plaintiff has appealed. The assignments of error relate to evidentiary rulings by the trial court and the sustaining of the motion to dismiss.

Although the lease and rider consist of some seven pages, the controversy centers around paragraph 1 of the rider, which provides as follows: "1. CONSTRUCTION. Lessor agrees to complete construc-

tion of the Building in which the leased premises are to be located at its cost and expense. All work other than that to be performed by Lessor shall be done by Lessee at Lessee's cost and expense, the same to include providing storage shelving, bookshelves, reception room counter, and any wall finish other than building standard paint. Lessor's work shall include installation of heating and air conditioning equipment of sufficient capacity to adequately heat and cool the leased space including a thermostat to be controlled by Lessee; the erection and finish with building standard paint all walls, with party walls to be sound proofed; all doors and door hardware; suspended ceilings; all supply and return registers with necessary duct work; lighting (to include at least three light fixtures in each of the offices marked 'attorney's offices' on Exhibit A, and such additional lighting fixtures as may be necessary to conform to recognized office lighting standards); baseboard strips on all walls; wall to wall carpet on all floors; window blinds and all electrical outlets, switches and covers, all as shown generally on Exhibit A. Lessor's work shall be completed by April 15, 1980, and Lessee shall have access to the leased premises without charge until the commencement of the lease term, other than proration of utilities as provided for herein."

The plaintiff argues that in paragraph 1 the defendant agreed to complete construction of the entire building by April 15, 1980. We do not agree.

Paragraph 1 relates, primarily, to the construction to be completed in the area of the building leased to the plaintiff, and allocates the cost as between the parties. The cost of construction of the building proper, as distinguished from fixtures (such as the shelving and reception room counter) was to be paid by the defendant. The installation of heating and air conditioning equipment, ductwork, lighting, carpeting, suspended ceilings, etc., in the plaintiff's offices was to be completed by April 15, 1980. This para-

graph did not provide as to *when* the construction of the rest of the building would be completed.

Paragraph 4 of the rider provides for payment by the lessee of its pro rata share of the cost of maintaining the common areas. Included as such expense is "planting, replanting and replacing flowers and landscaping." There is no provision in the lease as to when landscaping of the premises would be completed.

There was no provision in the lease as to when that part of the building not leased by the plaintiff and the landscaping of the grounds were to be completed, or that they would be completed at any time. To support the plaintiff's contention that the parties had agreed to a completion date for the rest of the building and the landscaping of the premises, the plaintiff attempted to introduce evidence as to conversations between the parties during the negotiations preceding the execution of the lease. Objections to this evidence upon the basis of the parol evidence rule were sustained and the testimony was not admitted.

The plaintiff contends that parol evidence was admissible to explain and aid in the construction of the agreement. That contention might have merit if some ambiguity existed as to when lessor was to perform the work lessee claims was to be done. However, the lease is completely silent as to such matters, and to permit the introduction of such evidence would be to expand the terms of the contract by parol evidence.

Parol evidence is not admissible to add to, contradict, or vary the terms of a written contract. *Rullman v. LaFrance, Walker, Jackley & Saville,* 206 Neb. 180, 292 N.W.2d 19 (1980). Where negotiations between the parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity. *Frank McGill, Inc. v. Nucor Corp.,* 195 Neb. 448, 238 N.W.2d 894 (1976).

We think there was no ambiguity in the lease concerning the matters which are in dispute between the parties. The defendant simply made no promise in the lease as to when the construction of the rest of the building and the landscaping of the grounds would be completed. The effect of admitting parol evidence concerning the prior negotiations would be to add terms to the lease.

The plaintiff argues that the agreement between the parties was only partially integrated. The agreement on its face appears to be fully integrated. The lease contained a provision concerning completion of construction of the building. The provision was that such construction shall be at the expense of the lessor. The inference is that if the parties had agreed upon a time for completion of the entire building, it would have been stated in the lease, just as the completion date for construction of the leased area was provided for in paragraph 1 of the rider. See *Traudt v. Nebraska P. P. Dist.*, 197 Neb. 765, 251 N.W.2d 148 (1977). We conclude that the lease was fully integrated and parol evidence was not admissible to supply terms omitted from the instrument.

The plaintiff also attempted to introduce testimony by a real estate broker and appraiser as to the meaning of the language in paragraph 1 of the rider. The construction of this paragraph presented a question of law, not fact, and the objections to this testimony were properly sustained.

The only evidence as to damages was testimony by the real estate broker and appraiser called by the plaintiff that in his opinion the fair rental value on March 25, 1981, of the space leased by the plaintiff was approximately $4.50 per square foot rather than $8 per square foot, the rent reserved in the lease. There was no evidence as to loss of profits or goodwill. Although the plaintiff may have suffered some embarrassment because of the appearance of the building and grounds, there was no evidence of "ex-

treme embarrassment," "humiliation," or "mental anguish" which could afford a basis for recovery.

As the trial court stated in its ruling on the motion to dismiss, there was some evidence of failure on the part of the defendant to fully perform the maintenance and cleaning obligations set out in the lease. There was no evidence which would provide a suitable basis upon which the jury could award damages for that breach.

We conclude that the motion to dismiss was properly sustained and the judgment should be affirmed.

AFFIRMED.

IN RE FREEHOLDER PETITION.
KAUFFMAN FARMS, INC., APPELLEE, V. EMERY KEITH HUTSELL ET AL., APPELLANTS.

330 N.W.2d 907

Filed March 4, 1983. No. 81-849.

1. **Schools and School Districts.** Best educative interest requires a showing that the convenience, necessity, or welfare of the student will be best served by the transfer, and may be demonstrated by proof of the accreditation of the respective schools, educational efficiency of the schools, and/or the leadership, management, and curricula of the schools involved.
2. **Witnesses: Rules of Evidence.** A parent, as an informed and concerned lay person, is competent to testify as to his or her opinion on best educative interest.

Appeal from the District Court for Hamilton County: BRYCE BARTU, Judge. Affirmed.

John F. Recknor of Barlow, Johnson, DeMars & Flodman, for appellants.

Carl D. Cohen, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

BOSLAUGH, J.

The appellants are taxpayers and electors in the

Marquette School District in Hamilton County, Nebraska. They appeal from the judgment of the District Court vacating the order of the freeholder board and granting the petition of Kauffman Farms, Inc., to transfer its property from the Marquette district to the Aurora School District under Neb. Rev. Stat. § 79-403 (Reissue 1981).

The record shows that the petitioner, a family farm corporation controlled by Clayton and Nancy Kauffman, owns land in both the Aurora and Marquette school districts. The family residence is located in the Marquette district and the three Kauffman children attended school in that district. The petitioner requested the freeholder board to transfer its land to the Aurora district, as such transfer was in the best educative interest of the Kauffman's youngest daughter, Susan.

The board denied the transfer and petitioner appealed to the District Court. That court found the action of the board arbitrary and capricious; that the transfer was in the best educative interest of Susan Kauffman; and ordered the land transferred.

On appeal to this court the appellants argue that the petitioner did not sustain its burden of proof on the issue of best educative interest. The appellants maintain that best educative interest requires proof by expert testimony, which was not produced by the petitioner.

The review of the decision of the District Court is de novo in this court. *In re Freeholder Petition, ante* p. 532, 330 N.W.2d 481 (1983); *Miller v. School Dist. No. 69,* 208 Neb. 290, 303 N.W.2d 483 (1981). This court has a duty to reach an independent conclusion without reference to the conclusion reached in the District Court.

The only issue tried by the District Court was whether the transfer was in the best educative interest of Susan Kauffman. "Best educative interest" requires a showing that the convenience, necessity, or welfare of the student will be best served by the

transfer, and may be demonstrated by proof of the accreditation of the respective schools, educational efficiency of the schools, and/or the leadership, management, and curricula of the schools involved. *Friesen v. Clark,* 192 Neb. 227, 220 N.W.2d 12 (1974).

Susan Kauffman attended school in the Marquette district until 1980, her junior year in high school. That year, her parents paid tuition to send her to school in the Aurora district. Her father cited concerns over the administration of the Marquette school and the quality of education provided there as the reasons for this change.

Dean Bergman, a management consultant for the Department of Education, and who had conducted a survey of the Marquette district in 1979-80 when the district was considering building a new facility, was called as a witness by the petitioner. He testified that the enrollment at Marquette was declining and the old building was in need of repair. At the completion of his study, he recommended to the Marquette board that, as an alternative to the new building, Marquette could either (1) affiliate with other neighboring districts, or (2) contract with other districts for specialized courses not offered by Marquette.

Bergman further testified that the Aurora school was accredited by the North Central association while Marquette was not; that in grades 9 to 12 the total instructional units offered by Aurora were 630.5 while Marquette offered only 385; that Aurora had 34 teachers in 1980-81 while Marquette had 16; and that Aurora has a full-time principal while Marquette has a part-time principal. Bergman testified that, in his opinion, the Aurora school offered "the potential opportunity for a better education."

A comparison of the courses taken by Susan Kauffman at Aurora and those offered at Marquette showed that four of her seven courses were not offered at Marquette. Of the three courses offered at both schools, the teachers at Aurora had master's

degrees and were endorsed in their subject areas while the teachers at Marquette had bachelor's degrees and were not all fully endorsed in their subject areas. Many of the courses available at Aurora are available at the Marquette school only by correspondence or extension.

Other testimony presented by the petitioner showed that the facilities and equipment provided by the Aurora school were either superior to or more available than those of the Marquette school. Counseling, particularly for the college-bound student, was more readily available to the student at Aurora. Susan Kauffman testified that she felt she was receiving a better education in the Aurora School District than she had at Marquette.

Clayton and Nancy Kauffman testified that, in their opinion, Susan's best educative interest was served by attending the Aurora school.

The appellants argue that the District Court erred in permitting Clayton and Nancy Kauffman to testify as parents to their opinion of what is in Susan's best educative interest, as such opinion can be rendered only by an expert. They raise a similar argument with respect to the opinion given by Susan Kauffman.

This issue was recently decided in *In re Freeholder Petition, supra.* In that case we held that "best educative interest" need not be relegated to the experts, although expert testimony would appear to be relevant to the issue. Further, we held that a parent, as an informed and concerned lay person, is competent to give an opinion when it is "rationally based on the perception of the witness and . . . helpful to a clear understanding of his testimony or the determination of a fact in issue." Neb. Rev. Stat. § 27-701 (Reissue 1979). This same rationale would permit Susan Kauffman, as a concerned and interested student, to testify as to her opinion of "best educative interest." The evidence was properly admitted.

There was evidence from which it could be inferred that the Marquette school had suffered from poor administration for some time. A superintendent had been convicted of embezzling a large sum of money from the district. Disciplinary policies were nonexistent or not enforced. In one incident a student had singed Susan's hair with a cigarette lighter. The teaching staff lacked support from the office of the superintendent and principal. Some of the students seemed to be aware of the lack of organization and took advantage of the teaching staff.

Upon de novo review, we conclude that the order of the District Court must be affirmed. The evidence shows that the best educative interest of Susan Kauffman would be served by the transfer.

The judgment of the District Court is affirmed.

AFFIRMED.

LARRY ANTHONY PIERSON, APPELLEE, V. ROSALIE JOAN PIERSON, APPELLANT.

330 N.W.2d 747

Filed March 4, 1983. No. 81-893.

Appeal from the District Court for Stanton County: RICHARD P. GARDEN, Judge. Affirmed.

Richard E. Mueting of Mueting, DeLay & Stoffer, for appellant.

Vince Kirby, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and SPRAGUE, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

The court, having considered the oral arguments and having reviewed the record de novo, finds that the decree of the trial court should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERWIN CHARLES SIMANTS, APPELLANT.

330 N.W.2d 910

Filed March 4, 1983. No. 82-093.

1. **Constitutional Law: Equal Protection.** Equal protection does not require that all persons be treated identically. It only requires that a distinction drawn by the Legislature between individuals has some relevance to the purpose for which the classification is made.
2. **Constitutional Law: Equal Protection: Insanity.** There is a rational basis for treating mentally ill dangerous persons who have been acquitted of a crime by reason of insanity differently than other mentally ill dangerous persons who have not.
3. _____: _____: _____. Neb. Rev. Stat. §§ 29-3701 et seq. (Cum. Supp. 1982), insofar as they apply only to persons acquitted of crime by reason of insanity, are constitutional and do not violate the constitutional right of equal protection of the laws.
4. **Mental Health: Appeal and Error.** This court will not interfere on appeal with a final order made by the District Court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof.

Appeal from the District Court for Lincoln County: MERRITT C. WARREN, Judge. Affirmed.

P. Stephen Potter of Bacon & Potter, for appellant.

Paul L. Douglas, Attorney General, and Martel J. Bundy, for appellee.

Daniel J. Popeo, Paul D. Kamenar, and Nicholas E. Calio, for amicus curiae Washington Legal Foundation.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

MCCOWN, J.

This is an appeal from an order of the District Court following a hearing mandated under the provisions of Neb. Rev. Stat. §§ 29-3701 et seq. (Cum. Supp. 1982). The District Court found the defendant presently mentally ill and dangerous to others by reason of his mental illness and ordered his commit-

ment to the Lincoln Regional Center. The defendant has appealed.

On October 17, 1979, after trial, the defendant was adjudged not guilty by reason of insanity on six counts of murder in the first degree. On October 26, 1979, the defendant was committed by the Lincoln County Mental Health Board to the Lincoln Regional Center for care and treatment.

On July 8, 1981, pursuant to § 29-3705 the District Court for Lincoln County asserted jurisdiction over the defendant for the purpose of conducting an evidentiary hearing on the status of the defendant. On November 25, 1981, following an evidentiary hearing, the District Court found there was "clear and convincing" evidence that the defendant was then mentally ill and dangerous to others and that the defendant would be dangerous to others in the foreseeable future as demonstrated by the overt acts involved in the six murders committed on October 18, 1975.

The court ordered the defendant committed for treatment and returned to the Lincoln Regional Center. The court also ordered that the defendant receive appropriate psychiatric treatment for the mental illnesses of personality disorder (mixed type), drug and alcohol abuse, and pedophilia. The court ordered the defendant confined in the security unit and specified other conditions of confinement as required by statute. The court also ordered that the next annual review and evidentiary hearing provided for by § 29-3703 be set for November 23, 1982. The defendant has appealed.

On this appeal the defendant contends that the statutes under which he was committed are unconstitutional and in violation of his rights of equal protection because persons facing mental commitment under the provisions of §§ 29-3701 et seq. after a verdict of acquittal on grounds of insanity are treated differently than persons facing mental commitment under the Nebraska Mental Health Commitment

Act, Neb. Rev. Stat. §§ 83-1001 et seq. (Reissue 1981).

Even assuming that the two classifications of persons are similarly situated for purposes of constitutional equal protection, a mere difference in treatment between the two classes, standing alone, does not invalidate the statutes nor render them constitutionally defective. Equal protection does not require that all persons be treated identically. It only requires that a distinction drawn by the Legislature between individuals has some relevance to the purpose for which the classification is made. *Baxstrom v. Herold,* 383 U.S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1965); *Powell v. State of Florida*, 579 F.2d 324 (5th Cir. 1978).

The purpose of §§ 29-3701 et seq. is to protect the public from mentally ill dangerous persons who have demonstrated their dangerous proclivities by committing criminal acts for which they are not punished because of insanity. Such past history of dangerous criminal behavior provides a rational basis for the classification.

Other courts have held that there is a rational basis for treating persons who have been acquitted of criminal charges on grounds of insanity differently than other mentally ill dangerous persons who have not, and upheld statutes similar to §§ 29-3701 et seq. See, *Benham v. Edwards,* 678 F.2d 511 (5th Cir. 1982); *United States v. Ecker,* 543 F.2d 178 (D.C. Cir. 1976); *Powell v. State of Florida, supra.*

There is a rational basis for treating mentally ill dangerous persons who have been acquitted of a crime by reason of insanity differently than other mentally ill dangerous persons who have not. Sections 29-3701 et seq., insofar as they apply only to persons acquitted of a crime by reason of insanity, are constitutional and do not violate the constitutional right of equal protection of the laws.

The defendant also contends that the court's findings that he was mentally ill and dangerous to himself or others by reason of mental illness as demon-

strated by an overt act or threat are not supported by the evidence. We disagree.

Evidence from the defendant's criminal trial was presented which established that the defendant had sexually assaulted a 10-year-old girl and then killed her along with five other members of her family.

Dr. Woytassek, the defendant's treating physician at the Lincoln Regional Center, testified that the defendant was suffering from mixed type personality disorder, drug and alcohol abuse, and pedophilia. He also gave his opinion that the defendant was a dangerous person based upon his previous drinking habits, his involvement with young girls, and his current lack of insight concerning his dangerous behavior and his refusal to admit that he had a serious problem. Dr. Woytassek also testified that defendant's mental condition had not materially changed since he was placed in the regional center.

Dr. Chesen, another witness for the State, testified that the defendant was very dangerous as a direct result of his mental condition and that his mental condition had not changed since Dr. Chesen's initial evaluation of him in 1976.

No witnesses, including the defendant's own experts, recommended that the defendant be released. In fact, one of the defendant's expert witnesses testified that there was a "very real risk" that the defendant could murder again if unconditionally released.

On the basis of this evidence the trial court found "clear and convincing" evidence that the defendant was mentally ill and dangerous. This court will not interfere on appeal with a final order made by the District Court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof. *State v. Mayfield,* 212 Neb. 724, 325 N.W.2d 162 (1982). In the present case it cannot be said as a matter of law that the order of the District

Court was not supported by clear and convincing proof.

The defendant's remaining assignments of error are without merit. The order of the District Court is affirmed.

AFFIRMED.

P. A. RUZICKA, DOING BUSINESS AS P & G BUILDERS, APPELLEE, V. MARTIN E. PETERSEN, JR., AND JANELLE L. PETERSEN, HUSBAND AND WIFE, APPELLANTS.

330 N.W.2d 913

Filed March 4, 1983. No. 82-108.

1. **Contracts: Words and Phrases.** The "estimated cost" of a building is its reasonable cost, erected in accordance with plans and specifications, and is not necessarily the amount agreed upon by the parties nor an offer to be accepted; it does not imply absolute calculation, but precludes accuracy.
2. **Contracts.** Where services are furnished to a party and knowingly accepted by him, the law implies a promise to pay their reasonable value.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Seb Caporale, for appellants.

Albert Lustgarten, for appellee.

KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and GRANT and HOWARD, D. JJ.

HOWARD, D.J.

Defendants appeal from a decree foreclosing plaintiff's mechanic's lien for labor in the construction of defendants' house, assigning as error only that a cost estimate submitted by plaintiff in the amount of $5,490 constituted a fixed contract price, which plaintiff had been paid, and that the court should not have allowed recovery on a quantum meruit basis in a larger amount. Defendants also seek reversal of the

trial court's dismissal of their counterclaim for an alleged mistaken overpayment to plaintiff. There is no claim or question regarding sufficiency or quality of the work.

The estimate is in typewritten form and reads: "Construction cost Estimate by P & G Builders for home of Mr. & Mrs. Martin Petersen. Frame and Finish as per plan all Cabinets, Vanities, Book Cases and Wet bars, Family room beams (no paneling). Cost estimate based on carpenter labor of $12.00 per hour. Total $5490.00." The underlining of the word "Estimate" is typewritten as an original part of the document.

The framing wall was completed about March 13, 1978. Plaintiff sent a bill to defendants, reciting "Framing labor on 12315 Seward St., 446½ hrs. @ $12.00. Framing labor due $5358.00." That amount was paid by defendants a few days later. The finish work was completed in July or August, and plaintiff mailed defendants a bill for $4,074, which is described, but which is not in evidence. Plaintiff met with defendants at their home on about August 7 and defendants paid $1,000, agreeing, according to plaintiff, to pay the remainder when they could. There is no evidence in the record that defendants complained of an overpayment of $868 (more than the $5,490 figure) before their counterclaim was filed. Mrs. Petersen testified that at the time they paid the $1,000, Mr. Petersen asked plaintiff, "Why did you go so far over your estimate or your bid?"

Defendants do not contend that the $1,000 payment was made in compromise or as an accord and satisfaction, but place their reliance on the contention that the $5,490 was a firm contract price and that the "overpayment" was a mistake, in that they thought a payment of $1,000 would bring the total of their payments to $5,490. Reviewing the case de novo on the record, we are not persuaded by defendants' version. By the same standard of review, we find the reasonable value of the work done to be the total of

the two bills, as contended for by plaintiff and disputed only by a witness who had done framing in the past but no cabinet work, and who had not been inside defendants' house. Regardless, however, of the construction which defendants appear to have placed upon the estimate, we must consider defendants' argument, actually straying from the assignments of error, that although plaintiff was entitled to recover for the reasonable value of the work done, his recovery could not exceed $5,490. Defendants cite *Denniston and Partridge Company v. Mingus,* 179 N.W.2d 748 (Iowa 1970), but in that case, in reviewing the trial court's finding that the parties had agreed plaintiff would build a crib and granary for "$5000, more or less," the Iowa Supreme Court held that the parties had an estimate, not a contract price, and the builder was entitled to recover on the theory of an implied contract for the fair and reasonable value of the work. The court pointed to the generally accepted definition of "estimated cost" of a building as its reasonable cost, erected in accordance with plans and specifications, and as not necessarily the amount agreed upon by the parties or as an offer to be accepted; that an estimate is the equivalent of "more or less"; that it does not pretend to be based on absolute calculations; and that the use of the term precludes accuracy. The court distinguished the case from the rule quoted in 17A C.J.S. *Contracts* § 363 at 368 (1963): "Where the contractor submits an estimate that the proposed work will cost not less than a certain sum and not more than another sum, whereupon he is directed to perform the work, no contract for a specific sum arises, and the contractor can recover the reasonable value of the services rendered, but not exceeding the larger sum." That is the holding of *Bates v. St. Anthony's Church,* 111 Neb. 426, 196 N.W. 638 (1923), which is also relied upon by defendants, who argue that "in the present case, there was no minimum in the estimate, just one figure that of

$5,490," and accordingly a maximum figure is thereby established. No authority for this proposition is stated, nor have we found any. There is authority to the contrary, as in *Vester J. Thompson, Jr., Inc. v. Citmoco,* 371 So. 2d 35 (Ala. Civ. App. 1977), where the contractor's estimate was $10,000 and the bill $15,420.79. The Alabama court quoted the *Denniston* case's definition of estimate, held that the contractor's recovery would not be limited to a $10,000 maximum, and distinguished the case from one in which a maximum amount had been quoted.

Where services are furnished to a party and knowingly accepted by him, the law implies a promise on his part to pay the reasonable value of the services. *Denton v. Nelson,* 205 Neb. 833, 290 N.W.2d 462 (1980).

The ultimate cost, compared with the estimate, was no doubt disappointingly high in the perspective of defendants, but we are cited to no authority and we are aware of no dominating principle which, on these facts and within reach of the assignments of error, require a result different from that decreed by the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD POPE, APPELLANT.

330 N.W.2d 747

Filed March 4, 1983. No. 82-143.

1. **Effectiveness of Counsel.** The two-part test to determine whether an attorney has effectively counseled a criminal defendant is that counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region and must also conscientiously protect his client's interests.
2. **Effectiveness of Counsel: Proof.** A defendant challenging competency of counsel has the burden to establish it. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions.

3. **Effectiveness of Counsel.** Acquiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not per se violative of the constitutional guarantees of effective assistance of counsel.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

John E. North, Jr., P.C., of Fromkin, Herzog, Jabenis & North, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

WARREN, D.J.

Defendant, Richard Pope, appeals from a judgment entered by the District Court of Douglas County, Nebraska, denying his request for post conviction relief, after an evidentiary hearing had been held. We affirm.

Pope was convicted in 1973, in a joint jury trial with his common-law wife, Evelyn Kilgore, of two counts of possession of a controlled substance with intent to deliver. The conviction was affirmed by this court in his direct appeal. *State v. Pope,* 192 Neb. 755, 224 N.W.2d 521 (1974).

The sole basis of Pope's request for an order vacating the judgment and conviction is the claim that he was denied the effective assistance of counsel in that (1) his counsel failed to suppress evidence seized by police in a warrantless search of the house where defendant was apprehended while frantically seeking to flush a considerable quantity of heroin and cocaine down the toilet; (2) his counsel failed to secure a severance of his trial and that of his codefendant, Evelyn Kilgore; (3) his trial counsel was unprepared; and (4) his counsel was prevented from providing effective assistance by a conflict of interest.

It is well established that one seeking post convic-

tion relief has the burden of establishing the basis for such relief and that the findings of the District Court in denying relief will not be disturbed on appeal unless they are clearly erroneous. *State v. Paulson,* 211 Neb. 711, 320 N.W.2d 115 (1982). The party challenging the adequacy of criminal trial representation has the burden of proof in showing incompetence, if any, therein. *State v. Hunt,* 212 Neb. 214, 322 N.W.2d 621 (1982).

Nebraska employs a two-part test for determining whether an attorney has effectively counseled a criminal defendant. First, counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region. Counsel must also conscientiously protect his client's interests. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions. *State v. Journey,* 207 Neb. 717, 301 N.W.2d 82 (1981).

Defendant's first two claims of ineffective counsel are simply complaints that counsel was unable to convince the trial court and the Supreme Court that evidence should have been suppressed and that the codefendants should have had separate trials. Both issues were properly raised by counsel for defendant and fully argued. See *State v. Pope, supra.* Failure to prevail in either argument demonstrates the lack of merit in the positions taken by the defendant, rather than the ineffectiveness of counsel.

With reference to the defendant's third claim, we can simply state that the record shows convincingly that trial counsel Edward Fogarty and J. Bruce Teichman, who were retained by defendant to replace his previous attorneys 10 days before trial, were experienced trial attorneys who were sufficiently prepared to vigorously represent defendant and conscientiously protect his interests. Their failure to secure an acquittal of the defendant in the face of overwhelming evidence of guilt presented by

the State is not probative of inadequate preparation or ineffective counsel.

Lastly, defendant claims a conflict of interest because his attorneys, by his own choice, also represented his codefendant, Evelyn Kilgore. "Acquiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not per se violative of the constitutional guarantees of effective assistance of counsel. [Citation omitted.] It is necessary that the appellant show the conflict of interest actually existed." *State v. Kerns,* 203 Neb. 278, 282-83, 278 N.W.2d 348, 350-51 (1979).

Defendant claims that he and his codefendant Kilgore wanted to testify at the trial that the controlled substances were hers alone, thus absolving this defendant, but were prevented from doing so by his attorneys. He submits as proof an affidavit signed by Kilgore on August 27, 1978, nearly 5 years after the conviction of both defendants. "When a trial culminates in a verdict of guilty the temptation is great for a defendant, armed with hindsight, to claim that his lawyer's strategy in not permitting him to run the cross-examination gauntlet was motivated by a conflict of interest. We do not say that such belated assertions are to be ignored. Each case must, of course, be viewed on its own facts. However, in the absence of objective evidence of corroboratory circumstances, such post-trial claims must be viewed with some suspicion . . . ." *United States v. Wisniowski,* 478 F.2d 274, 284 (2d Cir. 1973). Here, the experienced trial judge viewed the decision to allow neither codefendant to testify as showing merely competent counsel exercising sound tactical judgment and nothing more. No conflict of interest is apparent from a careful reading of the record. We find no conflict of interest proven by the defendant and, thus, no prejudice caused by the joint representation.

The decision of the trial court in denying relief is affirmed.

AFFIRMED.

ROADRUNNER DEVELOPMENT, INC., ET AL., APPELLANTS, V. ARTHUR AND SHARON KAY SIMS ET AL., APPELLEES.

330 N.W.2d 915

Filed March 4, 1983. No. 82-204.

1. **Pleadings: Class Actions.** A petition which contains no facts from which it can be concluded that it is impracticable to bring all of the parties before the court fails to state a necessary predicate for a class action.
2. **Pleadings.** For purposes of determining the sufficiency of a petition to state a cause of action, we must accept as true all facts well pleaded, but we do not accept as true facts not well pleaded, nor do we accept as true conclusions of law or of the pleader.
3. **Restrictive Covenants.** In determining whether the character of a neighborhood has so changed that the existing restrictive covenants can no longer be enforced, the test ordinarily is whether the original purpose and intention of the parties creating the restrictions are no longer of substantial benefit to the residents. The question is not whether suitable persons will in the future purchase property in the addition, but whether the restrictions still preserve to the addition its character created by the covenants at issue.
4. **Laches: Demurrer.** Where laches of the plaintiff and the staleness of his claim are apparent from the petition, objection thereto may be taken by demurrer.
5. **Laches.** Laches does not grow out of the mere passage of time but is founded upon the inequity of enforcing a claim where there has been a change in the condition of the property or in the relations of the parties.
6. **Laches: Proof.** A plaintiff whose petition shows apparent laches on its face must generally plead and prove an excuse for the delay.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Affirmed.

James H. Truell, for appellants.

James I. Shamberg of Cronin, Shamberg & Wolf, for appellees Rockwell.

Carl E. Willard, for appellees Hayes and Larkins.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and BUCKLEY, D.J., and COLWELL, D.J., Retired.

CAPORALE, J.

The trial court dismissed the last amended petition of the plaintiffs-appellants, Roadrunner Development, Inc. (Roadrunner), and John and Ruth Goding, husband and wife (Godings). The trial court had earlier sustained the demurrers of certain of the defendants-appellees, and plaintiffs elected to stand on the aforesaid petition. Plaintiffs appeal from the order of dismissal. We affirm.

Plaintiffs filed this declaratory judgment action to declare covenants restricting the use of certain described lands null and void, to set them aside, and to enjoin their enforcement. The relief is sought as to the named defendants-appellees "individually and as representatives of a class and all owners of lots in the subdivision."

According to the facts recited in the operative petition, in July of 1955 Godings agreed to purchase two lots in Roush Subdivision, Hall County, Nebraska. The purchase price was paid in monthly installments pursuant to a contract which specified certain use restrictions. These restrictions, among other things, required that the land be used only "for dwelling . . . . No dwelling shall be constructed on less than 8,000 sq. feet." In 1960 or 1966, it is not clear when since both dates are alleged, but in any event 2 days prior to the deed of conveyance delivered to the Godings pursuant to their contract, the owners of the subdivision executed and filed certain restrictive covenants which differ from those in the Godings' agreement and require that the property "be used for single family residential development of ranch style design only and requiring a minimum 50 foot front yard setback of any structure upon the lot. No multi-family, two-story or commercial establishments of any kind are to be erected." The petition states all subdivision lots "have been sub-

ject" to the last-described restrictions except for Block 4, which is owned by defendant-appellee Grand Island Tennis Club, Inc., and is used as a tennis establishment. Lots 5, 7, 8, and 9 in Block 2 have also allegedly never been subject to the last-described restrictions. In November of 1979 Roadrunner obtained title to 31 lots located in Blocks 1, 2, 5, and 6. None of the exempted lots in Block 2 were involved in the Roadrunner transaction. The petition further alleges that when the subdivision was dedicated and the restrictive covenants filed, the property within the subdivision was on the outskirts of the city of Grand Island and the property surrounding it was agricultural or single-family residential in nature. According to the petition, time, owing to the general growth of the city of Grand Island, has changed the uses to which property in "the neighborhood and in the vicinity" of plaintiffs' property is being put. Among other things, a mobile home court has been established to the south of the subdivision, traffic has increased, and the city of Grand Island has adopted a master plan calling for multifamily residential development in "the area of" Blocks 1, 2, 5, and 6 for the purposes of acting as a buffer between commercial and single-family residential development. Blocks 3 and 4 of the subdivision have been zoned as commercial property. Roadrunner concedes it seeks to enhance the value of the property it has purchased by changing the uses to which it may be put.

The defendants-appellees Randall D. and Donna L. Rockwell and Anita Elstermeier demurred on the grounds that the petition failed to state a cause of action and that there was a misjoinder of parties plaintiff. Defendants-appellees Reuben L. and Vivian Hayes, Iva M. Larkins, and Scott and Terri Bilslend elected to demur only on the ground that the petition failed to state a cause of action.

We turn our attention first to the purported class action nature of this action. Neb. Rev. Stat. § 25-319

(Reissue 1979) provides: "When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." Even if there were no due process concerns with respect to an effort to adjudicate the property rights of persons not served with process, an issue we need not now address and therefore do not now decide, the operative petition contains no facts from which it can be concluded that it is "impracticable" to bring all of the property owners in Roush Subdivision before the court. The petition therefore fails to state a cause as a class action against anyone. We must also determine, however, whether the action may proceed against the individual and named defendants. See *Blankenship v. Omaha P. P. Dist.*, 195 Neb. 170, 237 N.W.2d 86 (1976).

Neb. Rev. Stat. § 25-806 (Reissue 1979) provides that a defendant may demur to the petition when, inter alia, it appears on its face that "there is a defect of parties, plaintiff or defendant," or that "the petition does not state facts sufficient to constitute a cause of action."

The Roadrunner and the Godings transactions are not the same. Not only did they take place at different times and involve different lands, but the Godings' claimed right of action in part rests upon the variance between the restrictive covenants filed prior to the conveyance of title to them and those specified in their purchase agreement. Those facts are not available to the plaintiff Roadrunner. The fact that both Roadrunner and the Godings seek the same relief does not, in and of itself, entitle them to join in a single action. Those defendants who demurred on the ground there was a misjoinder of parties plaintiff were correct, and the trial court properly sustained those demurrers.

As to the defendants who did not demur on the misjoinder ground, we must determine whether the

petition states a cause of action on behalf of either Roadrunner or the Godings. For purposes of that examination we must accept as true all facts well pleaded, but we do not accept as true facts not well pleaded, nor do we accept as true conclusions of law or of the pleader. *Shelton v. Board of Regents,* 211 Neb. 820, 320 N.W.2d 748 (1982).

Plumb v. Ruffin, ante p. 335, 328 N.W.2d 792 (1983), teaches us that in determining whether the character of a neighborhood has so changed that the existing restrictive covenants can no longer be enforced, the test ordinarily is whether the original purpose and intention of the parties creating the restrictions are no longer of substantial benefit to the residents. The question is not whether suitable persons will in the future purchase property in the addition, but whether the restrictions still preserve to the addition its character created by the covenants at issue. In *Plumb* the defendant had attempted to show, as plaintiffs have alleged here, that the neighborhood surrounding the lots in question had changed to such an extent that the original purpose and intention of the parties in creating the restrictions could no longer be accomplished. There was evidence that some variance from the restricted single-family use of some lots had taken place and that there was commercial development, in accordance with the original plans, in areas immediately adjacent to defendant's lots. The remaining portions of the subdivision continued as residential property. In upholding the covenants, we noted the area had nonetheless developed as originally intended. Plaintiffs cite *Lund v. Orr,* 181 Neb. 361, 148 N.W.2d 309 (1967), which contains much of the same language as does *Plumb,* but held that, where 6 months later the purchaser's grantor sold all remaining land in the quarter section for the construction and development of a packing plant, the purchaser was no longer bound by covenants restricting his 1-acre tract to residential use. Plaintiffs also cite *Reed v. Williamson,* 164

Neb. 99, 82 N.W.2d 18 (1957), which upheld restrictive covenants for the stated period of their duration, thus preventing the drilling of oil and gas wells for that period. The test applied was part of the rule restated in *Plumb, supra.*

The question here, therefore, becomes whether plaintiffs have stated facts sufficient, if proved, to establish that, irrespective of whether suitable persons will in the future purchase property in Roush Subdivision, the character of the neighborhood has so changed that the original purpose and intention of the parties creating the restrictions are no longer of substantial benefit to the subdivision's residents and the character of the subdivision as a single-family residential area cannot be maintained. The facts well pleaded in these respects are that the use of certain lots within the subdivision is unrestricted and that the general plan of development of the area has been thwarted by growth and a change in the surrounding areas. As to the first complaint, there is nothing particularly inconsistent with the presence of a tennis club operation within a residential area, nor are there any allegations as to how Block 4 came to be devoted to such use. As to the other unrestricted lots, there is no allegation as to what, if any, use is being made of them. As to the second complaint, the fact that adjoining or surrounding property is used for business purposes does not, at least in and of itself, change the character of the specific subdivision so that the property therein may no longer be entitled to have the restriction enforced. There are no allegations in this petition that the Roush Subdivision per se has changed, only that certain parcels either surrounding it or in the same general vicinity as a whole have changed. The actions of the city through rezoning in master plan designations are irrelevant with respect to the enforcement of restrictive covenants. In such a situation the applicable restrictive covenant continues to override and supersede any less restrictive zoning

designations. See, *Staninger v. Jacksonville Expressway Authority,* 182 So. 2d 483 (Fla. App. 1966); *Morgan v. Matheson,* 362 Mich. 535, 107 N.W.2d 825 (1961); *Tower v. Mudd Realty Company,* 317 P.2d 753 (Okla. 1957); *Burgess v. Magarian,* 214 Iowa 694, 243 N.W. 356 (1932).

In short, there are no well-pleaded facts from which it can be concluded the restrictions do not still preserve the character of the property contained in Roush Subdivision as a single-family residential district and that the original purpose and intention of the parties creating the restrictions pursuant to the general scheme has been destroyed such that the changed condition means the restrictions are no longer of a substantial benefit to the residents of that subdivision. Indeed, a reading of the totality of the allegations contained in plaintiffs' petition suggests that Roush Subdivision itself has been largely untouched by any substantial changes. It cannot be said from the allegations in this petition that there has been any change which would even begin to represent a change of such magnitude that the original plan, purpose, and scheme had been so destroyed as to render the benefits of the restrictive covenants inoperable. The trial court was therefore correct in sustaining the demurrers grounded on the failure of the petition to state a cause of action by Roadrunner.

The same must be said as to the Godings. As pointed out earlier, their installment sales contract contemplating certain restrictions was executed in July of 1955; in 1960 or 1966 different restrictions were filed and 2 days later title was conveyed to the Godings; it was not until March 1981, or at least 15 years after the conveyance to the Godings, that the operative petition was filed. This jurisdiction is committed to the doctrine that where laches of the plaintiff and the staleness of his claim are apparent from the petition, objection thereto may be taken by demurrer. *Kozina v. Watkins Lumber Co.,*

146 Neb. 594, 20 N.W.2d 606 (1945); *Bend v. Marsh,* 145 Neb. 780, 18 N.W.2d 106 (1945). Laches does not, however, grow out of the mere passage of time but is founded upon the inequity of enforcing a claim where there has been a change in the condition of the property or in the relations of the parties. *Kozina v. Watkins Lumber Co., supra; Bend v. Marsh, supra.* The gravamen of the Godings' claim is that the land conveyed to them is different in quality than that which they contracted to purchase. Accepting, as we here must, the truth of the factual allegations leading to that conclusion, the Godings would appear, at first blush, to have stated a cause of action. See *Grand Island Hotel Corp. v. Second Island Development Co.,* 191 Neb. 98, 214 N.W.2d 253 (1974), holding that the covenants of warranty and title contained in a deed were breached by the existence of a paramount leasehold interest in a third party. Had the Godings elected to bring an action for damages, they would have had, at the latest, 5 years from the date of the conveyance to them. This jurisdiction is also committed to the rule that a plaintiff whose petition shows apparent laches on its face must generally plead and prove an excuse for the delay. *Baxter v. National Mtg. Loan Co.,* 128 Neb. 537, 259 N.W. 630 (1935). No such excuse has been pled by the Godings.

The trial court, therefore, also correctly sustained those demurrers resting on the sole ground that the operative petition failed to state a cause of action as to each defendant.

AFFIRMED.

KENNETH KABA, APPELLANT, V. CHARLES R. FOX, APPELLEE.

330 N.W.2d 749

Filed March 4, 1983. No. 82-236.

1. **Criminal Law: Constitutional Law: Appeal and Error.** Delaying

the right of appeal beyond a commitment for evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981) and until a final sentence is pronounced does not violate article I, § 23, of the Nebraska Constitution, which grants to everyone in a felony case the right to appeal to the Supreme Court.

2. **Criminal Law: Constitutional Law: Speedy Trial.** A delay in sentencing of 90 days pending a court-imposed evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981) is not such a delay as to be violative of the sixth amendment right to a speedy trial.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed.

Forrest F. Peetz of Peetz & Peetz, for appellant.

B. W. Strope, Holt County Attorney, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, HASTINGS, and CAPORALE, JJ., and BRODKEY, J., Retired, and RONIN, D.J., Retired.

HASTINGS, J.

This is the second appearance of this case. In a previous proceeding, *State v. Kaba,* found at 210 Neb. 503, 315 N.W.2d 456 (1982), the defendant, following a conviction of two felonies, appealed from an order of the District Court committing him to the Department of Correctional Services for an evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981). We held that because no sentence had been pronounced, the judgment was not final and therefore not appealable, and since the defendant did not challenge the constitutionality of § 83-1,105(3), we dismissed the appeal.

In this case Kenneth Kaba, the defendant in the previous appeal, brought a habeas corpus action against the sheriff to whom the District Court had remanded Kaba for the purpose of carrying out its previous commitment order. The court denied the application for the writ. Kaba appeals, assigning as error the failure of the District Court to grant the writ and the failure to find that § 83-1,105(3) is unconstitutional. We affirm.

A statute similar to § 83-1,105(3) is Cal. Penal Code

§ 1203.03(a) (West 1982), which provides: "In any case in which a defendant is convicted of an offense punishable by imprisonment in the state prison, the court, if it concludes that a just disposition of the case requires such diagnosis and treatment services as can be provided at a diagnostic facility of the Department of Corrections, may order that defendant be placed temporarily in such facility for a period not to exceed 90 days, with the further provision in such order that the Director of the Department of Corrections report to the court his diagnosis and recommendations concerning the defendant within the 90-day period." Compare that with § 83-1,105(3), which states: "Where the court is of the opinion that imprisonment may be appropriate but desires more detailed information as a basis for determining the sentence to be imposed than has been provided by the presentence report, [the court may] commit an offender to the Department of Correctional Services for a period not exceeding ninety days. . . ."

In *People v. Beckett,* 262 Cal. App. 2d 145, 68 Cal. Rptr. 464 (1968), the defendant pleaded guilty to three counts of forgery and was committed to the Director of Corrections for observation under § 1203.03. She appealed. The California Court of Appeals, Second District, held that her commitment for observation was not "a special proceeding and appealable as a final judgment." *Id.* at 146, 68 Cal. Rptr. at 465. See Neb. Rev. Stat. § 25-1902 (Reissue 1979). The California court went on to say that "A commitment under section 1203.03 of the Penal Code is an integral part of the criminal probation and sentencing process. If the Legislature had decided that an order for commitment under that section be separately appealable, it would have so provided in the Penal Code. It did not do so." *Id.* at 146, 68 Cal. Rptr. at 465. We agree with that reasoning.

Kaba cites *State v. Kelley,* 198 Neb. 805, 255 N.W.2d 840 (1977), for the proposition that article I, § 23,

of the Nebraska Constitution provides that "In all cases of felony the defendant shall have the right of appeal to the Supreme Court . . . ." However, § 25-1902 explains that a final order which may be appealed is one "affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding . . . ." The fact of the matter is that every defendant, including Kaba, is entitled to an appeal. He may exercise such right when a final order, i.e., a sentence, is imposed. No such final order has as yet been entered. *State v. Kaba, supra; People v. Beckett, supra.*

The petitioner also insists that by delaying sentencing pending an evaluation as permitted by § 83-1,105(3) a defendant is denied his right to a speedy trial as provided by the sixth amendment to the U.S. Constitution, and by Article I, § 11, of the Nebraska Constitution. In *Brooks v. United States,* 423 F.2d 1149 (8th Cir. 1970), the defendant pleaded guilty to a felony on October 19, 1962. Sentencing was scheduled for January 23, 1963. In the meantime, the defendant was arrested and confined in jail as a result of a state murder charge. He was found guilty on the latter charge and sentenced to life imprisonment. On September 6, 1963, the defendant appeared in federal court and was sentenced on the original federal charges. At 1152 n. 3 the court observed that a 90-day interval for the court to conduct a presentence investigation is reasonable on its face. In affirming the dismissal of petitioner's motion to vacate the federal court sentence, the court stated: "In the instant case, the actual delay in the sentencing for the federal charges was from January 23, 1963, (the date originally set) to September 6, 1963, that is, approximately seven and one-half months. Even if one were to consider the delay to extend from October 19, 1962, to the date of actual sentence, a little over ten months, this interval of

time is much less than that found in many cases which have turned away similar Sixth Amendment claims. We are again reminded that the essential ingredient of the Sixth Amendment right to a speedy trial is 'orderly expedition and not mere speed.' " *Id.* at 1152.

A delay in sentencing of 90 days pending a court-imposed evaluation is not such a delay as to be violative of the sixth amendment right to a speedy trial.

Section 83-1,105(3) is not unconstitutional, and the District Court was correct in denying the petitioner's application for a writ of habeas corpus. Its judgment is affirmed.

AFFIRMED.

THOMAS P. ROEPKA, APPELLANT, V. CHARLES R. FOX, APPELLEE.

330 N.W.2d 751

Filed March 4, 1983. No. 82-257.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed.

Arlen D. Magnuson, for appellant.

B. W. Strope, Holt County Attorney, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, HASTINGS, and CAPORALE, JJ., and BRODKEY, J., Retired, and Ronin, D.J., Retired.

HASTINGS, J.

This case involves a conviction of the petitioner, Thomas P. Roepka, of the January 15, 1982, felony offenses of possession of cocaine and possession of LSD. The District Court ordered him committed to the Department of Correctional Services for a 90-day evaluation under the provisions of Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981). Relying upon our holding and statement in *State v. Kaba,* 210 Neb. 503,

315 N.W.2d 456 (1982), the petitioner applied for a writ of habeas corpus, which was denied by the District Court. This case was argued in this court with *Kaba v. Fox, ante* p. 656, 330 N.W.2d 749 (1983), which decision is determinative of all the issues raised here.

The judgment of the District Court in denying the application for a writ of habeas corpus was correct and its judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BILLY BRUCE, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. BETTY BRUCE, APPELLANT.
330 N.W.2d 752

Filed March 4, 1983. Nos. 82-502, 82-503.

Municipal Ordinances: Presumptions. The existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Clay B. Statmore and Michael J. Elsken of the Statmore Law Offices, for appellants.

John C. McQuinn, Assistant City Prosecutor, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

PER CURIAM.

In these consolidated cases the defendants were charged with violating Lincoln Municipal Code § 27.81.010(d) (1979) by unlawfully having a mobile home on their property. The Lincoln Municipal Court, following trial on stipulated facts, found the defendants guilty and fined them $25 each, plus

court costs. The defendants appealed to the District Court, which affirmed the judgments and sentences of the municipal court, and this appeal followed.

The defendants on this appeal contend that the mobile home ordinance is unconstitutional, arbitrary, and unreasonable as applied to them.

The section of the Lincoln Municipal Code under which the defendants were sentenced does not appear in the record. This court will not take judicial notice of an ordinance which does not appear in the record. The existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record. *State v. Shea,* 208 Neb. 17, 301 N.W.2d 602 (1981); *State v. Long,* 206 Neb. 446, 293 N.W.2d 391 (1980).

In the absence of the relevant ordinance in the record, the convictions and sentences are affirmed.

AFFIRMED.

Editor's Note: The opinion in *Flood v. Keller* published in the Advance Sheets at this citation, 213 Neb. 662-664, was withdrawn from the bound volume because reargument was granted.

Cite as 213 Neb. 665

JAMES D. QUINN, TRUSTEE, APPELLANT, V. GODFATHER'S INVESTMENTS, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

330 N.W.2d 921

Filed March 11, 1983. No. 81-820.

1. **Declaratory Judgments: Appeal and Error.** This court has treated the determination of factual issues in a declaratory judgment action, which would otherwise be an action at law, in the same manner as if a jury had been waived. The findings of the trial court therefore have the effect of the verdict of a jury and will not be set aside unless clearly wrong.
2. **Contracts.** A provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one.
3. **Contracts: Evidence.** In interpreting a written contract, the meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had reason to know would be given to the words by the other party.
4. **Contracts.** If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed.

Paul A. Rauth and Ephraim L. Marks of Marks, Clare, Hopkins, Rauth & Cuddigan, for appellant.

Edward G. Warin and Eugene P. Welch of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, and HASTINGS, JJ., and BRODKEY, J., Retired.

WHITE, J.

This is a declaratory judgment action brought by James D. Quinn, lessor-appellant, against God-

father's Investments, Inc., the lessee-appellee. (The term appellee hereafter shall refer to both Godfather's Investments, Inc., and William M. Theisen, president and chairman of the board of Godfather's Investments, Inc.) The action sought determination of whether or not the appellee was liable for lost rental income and the value of contemplated leasehold improvements upon a claim arising out of a lease agreement. The trial court entered judgment in favor of the appellee, finding (1) that the lease was ambiguous with respect to the term "financing," (2) that the evidence failed to establish mutual assent among the parties with respect to the terms of said financing, and (3) that the evidence establishes that, had there been such mutual assent, the appellee made a good faith effort to obtain financing. We affirm.

Godfather's Investments, Inc., owns and operates pizza restaurants and also sells franchises to others under the name of Godfather's Pizza. In the fall of 1979 appellee embarked on a plan to erect a home office building to meet its long-term office space requirements. In the course of its search for a suitable site, appellee became interested in leasing and building upon a tract of about 2.7 acres of unimproved land located at 107th and Pacific Streets, Omaha, Nebraska. Title to the property was held in trust by James D. Quinn.

During negotiations between the parties and prior to the execution of the lease, the appellee signed an application with Banco Mortgage Company in an attempt to secure funds for the building project. The application provided that Banco would act at the exclusive agent for the appellee in locating a lender.

On February 14, 1980, after extensive negotiations, the parties executed the lease agreement. The term of the lease was 50 years, commencing June 1, 1980,

with the lessee having two 10-year options to renew. The lease agreement contained the following provision: "33. . . . H. Should Lessee be unable to obtain financing for the construction of the contemplated improvements, Lessee may terminate this lease, provided, however, termination shall not require Lessor to refund any lease payments made prior to termination, and Lessee shall be bound to make any payments becoming due on or before the date of termination."

In January 1980 Banco Mortgage Company had narrowed its list of potential lenders to four: Teachers Insurance and Annuity Association, Pacific Mutual Insurance Company, Metropolitan Life Insurance Company, and Union Labor Life Insurance Company. Between February 5 and February 12, 1980, Banco submitted the appellee's applications for mortgage financing on terms of $1.5 million, approximately 12 percent interest, and a payout on a 15- to 30-year amortization schedule to the above-mentioned insurance companies. None of the four companies were interested in making a loan to the appellee on the terms contained in the applications, nor were any other terms mentioned to appellee at which a loan would have been possible. Because of interest rate increases and unstable market conditions at the time the applications were rejected, Banco recommended that the appellee withdraw from the market until more favorable conditions might prevail.

Due to a dramatic increase in its staff, the appellee decided to rent office space. The appellee formally notified the appellant by letter dated May 2, 1980, that it was terminating the project because it could not obtain financing. This litigation followed.

The appellant's first contention is that this was an equitable declaratory judgment proceeding tried to

the court without a jury and, therefore, this court must redetermine the issues of fact upon a de novo review of the record. This issue was specifically dealt with in *Larutan Corp. v. Magnolia Homes Manuf. Co.,* 190 Neb. 425, 433, 209 N.W.2d 177, 182 (1973), where we stated: "This court has treated the determination of factual issues in a declaratory judgment action which would otherwise be an action at law in the same a anner as if a jury had been waived. The findings of the trial court therefore have the effect of the verdict of a jury and will not be set aside unless clearly wrong."

The proceedings in the trial court clearly took the form of an action at law for damages for the breach of a lease agreement. We therefore find the rule of *Larutan* applicable here.

The appellant also argues that the trial court erred in (1) finding that the lease was ambiguous, (2) finding that the evidence failed to establish mutual assent between the parties as to the meaning of financing, and (3) finding that the appellee had made a good faith effort to obtain financing even if mutual assent to the term was present.

In viewing the lease we are in agreement with the trial court that it was ambiguous. The lease states that should the lessee (appellee) be unable to obtain financing for the construction of the contemplated improvements, the lessee may terminate the lease. The lease fails to explain or specify what is meant by the term "financing." A provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one. *Hansen v. Circle Lake Development Corp.,* 199 Neb. 678, 260 N.W.2d 609 (1977).

In interpreting a written contract, the meaning of

which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had reason to know would be given to the words by the other party. *Ely Constr. Co. v. S & S Corp.*, 184 Neb. 59, 165 N.W.2d 562 (1969).

The trial court was therefore correct in allowing the admission of parol evidence for the purpose of explaining the true nature of the transaction between the parties.

Although the lease agreement contained the promise that the appellee would attempt to obtain financing in order to construct the leasehold improvements, the parol evidence admitted showed that the parties failed to agree on the exact definition of the term "financing." The trial court held that mutual assent was lacking and therefore a valid contract did not exist.

In discussing the implication of obligations, the writers of 17 Am. Jur. 2d *Contracts* § 255 at 649 (1964) stated: "If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it."

In the instant case, while it might be a better practice to set forth the interest rate, the term, the rate of repayment, and other terms and conditions, it was not necessary to an enforceable agreement because the court implies into the contract that a good faith effort will be made by the person promising to seek financing. See *Hansen, supra.* We find it unnecessary to discuss this point further because the trial court held, in the alternative, that even if a valid contract existed, the appellee made a good

faith effort to accomplish financing for the construction of the leasehold improvements.

There is ample evidence in the record to sustain the trial court's findings that the appellee made a bona fide effort to obtain financing. The appellee made a reasonable effort to determine what type of loan it needed and made a valiant effort to obtain it. Every loan application that was filled out by the appellee contained the same terms. The appellee contacted every possible interested lender under its exclusive contract with Banco. The four insurance companies which turned down the appellee's loan did so without suggesting any different rates at which a loan may have been feasible. It was at this time that Banco advised the appellee to withdraw from the market until it stabilized.

Other contentions raised by the appellant have been examined and found to be without merit.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GRANT MANCHESTER, APPELLANT.

___ N.W.2d ___

Filed March 11, 1983. No. 81-921.

1. **Homicide: Criminal Attempt.** Attempted murder requires proof of conduct amounting to a substantial step toward commission of the crime and which is strongly corroborative of the necessary criminal intent.
2. _____: _____. Solicitation of an innocent agent to kill the victim may be proof of conduct amounting to a substantial step toward commission of attempted murder.
3. _____: _____. Proof that the defendant made plans for the murder, solicited a killer, discussed the contract price and set the

money aside in his billfold, arranged for a weapon, and showed the killer the victim, his residence, and his place of work is sufficient evidence of conduct amounting to a substantial step toward commission of attempted murder in the first degree, and will support a finding of guilty.

4. **Criminal Attempt.** Abandonment is not a defense to criminal attempt in Nebraska.
5. **Trial: Evidence.** Generally, the rule of completeness is concerned with the danger of admitting a statement out of context. When this danger is not present it is not an abuse of discretion to fail to require the production of the remainder or, if it cannot be produced, to exclude all the evidence.
6. **Evidence: Appeal and Error.** The general rule is that the admissibility of physical evidence rests in the discretion of the trial court, and the determination of admissibility will not be overturned unless there is a clear abuse of discretion.
7. **Criminal Law: Jurisdiction.** Where requisite elements of the completed crime are committed in different jurisdictions, any state in which an essential part of the crime is committed has jurisdiction of the offense.
8. **Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before the Supreme Court.
9. _____: _____. Opening and closing statements must appear in the bill of exceptions before alleged errors concerning them can be reviewed.
10. **Criminal Law: Prosecuting Attorneys.** Absent bad faith and prejudice to the defendant, the action of the trial court with regard to alleged misconduct of the prosecutor will not be deemed an abuse of discretion.
11. **Sentences.** A sentence imposed within the statutory limits will not be overturned on appeal absent an abuse of discretion by the trial court.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein, for appellant.

Grant Manchester, pro se.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

BOSLAUGH, J.

The defendant was convicted of attempted first

degree murder and sentenced to imprisonment for 16 to 30 years. He has appealed and assigned as error that the evidence was insufficient to support the finding of guilt; that instruction No. 10, relating to the defense of abandonment, was erroneous; and that the trial court erred in admitting into evidence tape recordings of his conversations with a witness. In a separate pro se brief the defendant contends the court lacked jurisdiction because some of the acts occurred in the State of Iowa; there was misconduct of the prosecuting attorney in his opening and closing statements; and the sentence was excessive.

The record shows that in April 1978 the defendant began having an affair with Mrs. Carolyn Rickard, who was married to Donald Rickard. In September 1979 the defendant and Mrs. Rickard went to Florida for about 3 weeks. Mrs. Rickard left a note for her husband, explaining that she was leaving to think about getting a divorce. Following her return to Omaha Mrs. Rickard told the defendant that she wanted to break off her relationship with him and go back with her husband. Mrs. Rickard testified that the defendant harassed her on several occasions after she announced her intentions, but she continued to see the defendant until January 1981, 6 months before the time of his arrest on this charge.

Donald Rickard testified that in late 1979 his wife told him of her relationship with the defendant. Rickard first encountered the defendant in a shopping center in December 1980. Rickard testified that the defendant had called him at work and had had nude pictures of Mrs. Rickard delivered to him at his place of employment. In April or May 1981 the defendant threatened Rickard with a gun while Rickard was at work; the defendant was arrested and convicted of third degree assault.

Carthell Sherrill, a cab driver for Happy Cab and a coworker of the defendant, testified that in April 1981 the defendant approached him about wanting "to give a guy a ride in a black limousine." He tes-

tified that the defendant wanted Sherrill to kill Donald Rickard, and, for insurance reasons, the defendant wanted it to look accidental.

Sherrill testified that he and the defendant discussed this matter several times a week. The initial price discussed was $800 "C.O.D." The defendant showed Sherrill the money on several occasions. The defendant and Sherrill discussed several plans concocted by the defendant for the killing. In the first, Rickard was to look like the victim of a hit and run. The next plan was to shoot Rickard while he was in his car. Another plan was to shoot him at his place of employment. The final plan was to shoot Rickard as he stood at his bedroom window.

Sherrill testified that the defendant took him on the routes Rickard used to and from work, and to his place of employment. The defendant showed Sherrill the intended victim through binoculars while Rickard was entering his workplace. The defendant also took Sherrill to Rickard's residence.

Sherrill and the defendant discussed a weapon for the killing. Sherrill told the defendant he had a .30/06 rifle, and showed it to him. The defendant discussed arranging an alibi for himself.

On June 2, 1981, Sherrill went to the police and informed them of the defendant's plan. Sherrill agreed to be outfitted with a microphone and to meet again with the defendant while under police surveillance. Sherrill, so outfitted, drove his cab out to the Omaha airport and met the defendant. The defendant had been drinking heavily that day. The defendant and Sherrill drove to a Kwik Shop in Carter Lake, Iowa, where the defendant made calls regarding the purchase of a scope for the rifle. The defendant gave Sherrill $25 for the purchase of a scope; Sherrill turned the money over to police.

At this meeting Sherrill suggested to the defendant that a third person be used for the shooting, as Sherrill's eyes were not good enough for such a distance. The defendant did not approve of another's

involvement, as he felt it was too risky. The defendant was to meet Sherrill again on the evening of June 2, but he failed to show. These conversations between the defendant and Sherrill were recorded and took place under police surveillance.

On June 3, 1981, Sherrill, again outfitted with a recording device, drove his car out to the airport. This time he brought along an undercover police officer, who was posing as a killer-for-hire. The officer had a .30/30 rifle with a scope along with him.

Sherrill met the defendant at the airport and agreed to talk with him at Kiwanis Park in Omaha. At that meeting the defendant was uncomfortable and nervous about the presence of a third person. The officer showed the defendant the gun, when the defendant finally approached Sherrill's car. Sherrill informed the defendant that they wanted partial payment up front, but the defendant insisted the deal was C.O.D. The defendant indicated that he might buy the gun. The defendant pulled out "a bunch of hundred dollar bills" and showed them to Sherrill. The defendant was then arrested and charged with attempted first degree murder. At the time of his arrest the defendant had $995 on his person, $800 of which was folded up between two pieces of paper.

The defendant maintained that any plans to kill Rickard were not seriously formulated and were devised by Sherrill. The defendant testified that Rickard was, by his wife's account, a dangerous man. The defendant felt he had been framed in a plot between Sherrill and Rickard.

The defendant contends that the evidence was insufficient to support the finding of guilt because the evidence did not show that the defendant had taken a "substantial step" toward the commission of the crime. The defendant argues that his acts amounted to "mere preparation."

Neb. Rev. Stat. § 28-201 (Reissue 1979) provides in part: "(1) A person shall be guilty of an attempt to commit a crime if he:

"(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

"(b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.

"(2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

"(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent."

In *State v. Sodders,* 208 Neb. 504, 507, 304 N.W.2d 62, 64-65 (1981), we said: "[T]he statute [§ 28-201] requires that the dangerous disposition [of the actor] be manifested by some intentional act which would constitute a substantial step toward the completion of the crime if the circumstances were as the actor believed them to be. . . . Some examples of such conduct might be: Lying in wait for the intended victim; unlawful entry into a structure where it is contemplated that the crime will take place; possession or fabrication of the material necessary to complete the act which finally would constitute the crime; or soliciting an innocent agent to engage in conduct constituting an element of the crime."

In *Sodders, supra,* the defendant had arranged for the murder of his wife and had made a downpayment on the $5,000 price. The defendant pleaded guilty but filed a motion to vacate the judgment and sentence, arguing that § 28-201 was unconstitutionally vague. The motion was overruled and the judgment affirmed on appeal. We held the statute gave

adequate notice of the prohibited conduct and that the defendant's acts were sufficient to constitute the crime. See, also, *State v. Schmidt, ante* p. 126, 327 N.W.2d 624 (1982), in which the evidence was held sufficient to support a conviction for attempted murder.

Conduct similar to that in the present case has been held to support convictions of attempted murder. In *Duke v. State,* 340 So. 2d 727 (Miss. 1976), the defendant solicited an employee to kill his business partner. The murder was to take place on a hunting trip. That plan failed and the defendant sought to hire another killer. An FBI agent posed as the killer and collected $11,500 from the defendant after representing to the defendant that the partner was dead. This evidence was held sufficient to sustain the conviction, as the defendant's acts went far beyond mere preparation.

In *Braham v. State,* 571 P.2d 631 (Alaska 1977), the defendant and the hired killer agreed on a contract price. The defendant then arranged a situation whereby the killer could get to know the victim and enter into a relationship of trust with him. The court held this sufficient to support the conviction, as it was an unequivocal act toward the commission of a crime. See, also, Annot., 54 A.L.R.3d 612 (1974).

In the present case the defendant engaged in a series of acts directed at bringing about the murder of Rickard and corroborative of his criminal intent. The defendant made plans for the murder, solicited a killer, discussed the contract price and set the money aside in his billfold, arranged for the weapon and a scope, and showed the killer the victim, his residence, and his place of work. These acts were substantial steps which sustain the conviction.

Instruction No. 10 charged the jury that abandonment is not a defense to attempted murder, but it may be considered as bearing on the issue of criminal intent. The defendant contends the instruction was erroneous and cites the inclusion of abandon-

ment as a defense to attempt in the Model Penal Code § 5.01 (Tent. Draft No. 10, 1960) upon which the Nebraska attempt statute is patterned.

This issue was decided in *State v. Schmidt, supra.* In that case we said at 131-32, 327 N.W.2d at 627: "Schmidt further argues that even if he had committed the crime of attempted murder, the act was completely and voluntarily abandoned and therefore, under the provisions of the Model Penal Code from which our § 28-201 is patterned, the act of abandonment should be considered as an absolute defense to the instant charge. While it is true that the Model Penal Code, which was used as a guideline by the Legislature when it adopted § 28-201, does contain the defense of abandonment in § 5.01(4) (Tent. Draft No. 10, 1960), it is further true that the defense was not included in the act when adopted by the Legislature. Nor can it be said that the omission of the defense of 'voluntary abandonment' in connection with the crime of criminal attempt was either an oversight by the Legislature or due to its failure to know that such a defense could have been included when it adopted the criminal attempt statute in 1977. At the same time that § 28-201 was adopted, the Legislature also enacted Neb. Rev. Stat. § 28-202 (Reissue 1979), the crime of 'conspiracy.' As a part of the crime of criminal conspiracy, the Legislature specifically adopted the defense of abandonment or renunciation of criminal intent. See Neb. Rev. Stat. § 28-203 (Reissue 1979). The defense, however, was limited to the crime of conspiracy under § 28-202, and did not include criminal attempt, § 28-201. Schmidt concedes that this defense has never been adopted in Nebraska but maintains that this court should nevertheless treat abandonment as an affirmative defense to be judicially grafted into the statutes. If that portion of the Model Penal Code is to become a part of the substantive law of the State of Nebraska, it is for the Legislature to do, and not for this court. Since abandonment is not a defense

to the commission of the crime of criminal attempt under Nebraska law, Schmidt's assignment of error is without merit."

The defendant argues that the cassette sound recordings taken during the police surveillance of his conversations with Sherrill should not have been admitted into evidence. Three tapes were made; however, only tapes one and two, the June 2 conversation, were produced at trial. The police testified that the third tape, the June 3 conversation, had somehow been lost. The defendant argues that the ruling on his objections was an abuse of discretion under Neb. Rev. Stat. § 27-106 (Reissue 1979).

Section 27-106 provides: "(1) When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given. When a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence.

"(2) The judge may in his discretion either require the party thus introducing part of a total communication to introduce at that time such other parts as ought in fairness to be considered contemporaneously with it, or may permit another party to do so at that time."

The general rule regarding the admissibility of tape recordings is that recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper foundation is laid. *State v. Loveless,* 209 Neb. 583, 308 N.W.2d 842 (1981). Under this rule, tapes one and two were properly admitted.

However, the defendant argues that it was an abuse of discretion to admit the first two tapes when

the third tape, possibly exculpatory, could not be produced. The trial judge reasoned that the tapes were admissible since they were simply corroborative of the conversation and the oral testimony of the parties to the conversation was available.

The defendant's argument is based on the "rule of completeness," which states that an opponent may require one introducing part of a writing or statement to introduce any part which ought in fairness to be considered with the part introduced. See, Fed. R. Civ. P. 32(a)(4), which applies the rule to use of depositions; McCormick on Evidence § 56 (2d ed. 1972); Fed. R. Evid. 106, Notes of Advisory Committee.

The Nebraska statute does not automatically require that the proponent of evidence produce remaining portions of a writing or statement upon request by an opponent. Rather, it permits inquiry into the whole on cross-examination or introduction of the whole by the opponent. In his discretion a judge may require introduction of the remainder as fairness requires. See *Spani v. Whitney,* 172 Neb. 550, 110 N.W.2d 103 (1961) (predecessor statute).

Generally, the rule of completeness is concerned with the danger of admitting a statement out of context. *McCormick, supra.* When this danger is not present it is not an abuse of discretion to fail to require the production of the remainder or, if it cannot be produced, to exclude all the evidence. In the present case tapes one and two were admitted in their entirety. The defendant was free to cross-examine with regard to them. The third tape dealt with a different conversation on a different date. Both the State and the defendant were required to prove this conversation by oral testimony. Thus, neither party was placed at a greater disadvantage because the tape could not be found. Further, tapes one and two were not severed from the third tape in such a manner as to create an "out-of-context situation" envisioned by the rule. The admission of

tapes one and two was not an abuse of discretion.

The defendant further argues that the rule of *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), applies in this case. *Brady* requires proof that exculpatory evidence was intentionally kept from the defendant. See *United States v. Hooper,* 596 F.2d 219 (7th Cir. 1979).

Here, there was no evidence of bad faith in the loss of the third tape, nor that the information contained in the tape was intentionally withheld from the defense. Therefore, the rule in *Brady* was not applicable.

In his brief pro se the defendant contends that the $25 in currency received by Sherrill from the defendant was improperly admitted since it could have been on Sherrill's person before the meeting. The general rule is that the admissibility of physical evidence rests in the discretion of the trial court, and the determination of admissibility will not be overturned unless there is a clear abuse of discretion. *State v. Weible,* 211 Neb. 174, 317 N.W.2d 920 (1982). In the present case proper foundation was laid for the admission of the $25. The jury was free to decide whether or not to believe Sherrill's testimony. The credibility of a witness is an issue for the trier of fact; it is not the function of the Supreme Court to weigh the credibility of a witness. *Mustion v. Ealy,* 201 Neb. 139, 266 N.W.2d 730 (1978). There was no abuse of discretion in admitting the evidence.

The defendant next argues that because the only "overt act," the receipt of the $25 by Sherrill, took place in Iowa, the Nebraska court had no jurisdiction in this case. The defendant had engaged in much conduct in Nebraska aimed at bringing about the murder of Rickard, which was to occur in Nebraska. The $25 paid for the scope was but one of the substantial steps required by the statute.

Where requisite elements of the completed crime are committed in different jurisdictions, any state in which an essential part of the crime is committed

has jurisdiction of the offense. *State v. Hilpert, ante* p. 564, 330 N.W.2d 729 (1983); 21 Am. Jur. 2d *Criminal Law* § 345 (1981). In the present case the crime was to be committed in Nebraska and substantial steps to complete the crime had been taken in Nebraska. The fact that one act was committed in Iowa does not deprive the Nebraska courts of jurisdiction.

In *State v. Reldan,* 166 N.J. Super. 562, 567, 400 A.2d 138, 141 (1979), the court said: "[T]he state has cited the well-established principle that a sovereign has jurisdiction to try an offense where only part of that offense has been committed within its boundaries. See, *e.g., Leonard v. United States,* 500 *F.* 2d 673 (5 Cir. 1974) . . . ."

In *State v. Poland,* 132 Ariz. 269, 275, 645 P.2d 784, 790 (1982), the court said: "When the elements of a crime are committed in different jurisdictions, any state in which an essential part of the crime is committed may take jurisdiction. *State v. Scofield,* 7 Ariz.App. 307, 438 P.2d 776 (1968). 'Any element,' then, can confer jurisdiction. *State v. Bussdieker,* 127 Ariz. 339, 621 P.2d 26 (1980)."

The defendant contends that remarks by the prosecutor, which were not corrected by the court, made it impossible to receive a fair trial. The defendant asserts that in his opening and closing statements the prosecutor misstated the law of intent and made comments regarding incidents about which the defendant did not testify. The opening and closing statements are not a part of the record.

A bill of exceptions is the only vehicle for bringing evidence before the Supreme Court. *State v. Spurgeon,* 200 Neb. 719, 265 N.W.2d 224 (1978). Opening and closing statements must appear in the bill of exceptions before alleged errors concerning them can be reviewed. *Peery v. State,* 165 Neb. 752, 87 N.W.2d 378 (1958). In *State v. Harris,* 205 Neb. 844, 290 N.W.2d 645 (1980), we held that in order to predicate error upon an improper argument to the

jury, it is necessary to make an objection, receive an adverse ruling thereon, and have the same made part of the bill of exceptions. This assignment of error is without merit.

The defendant asserts that questioning by the prosecutor of the witness Sherrill regarding the tape recording was overly suggestive. The defendant's objections in this regard were overruled.

The propriety of the conduct of a prosecutor during the examination of witnesses falls within the discretion of the trial court. Absent bad faith and prejudice to the defendant, the action of the trial court with regard to the conduct will not be deemed an abuse of discretion. See, *State v. Brown,* 169 Conn. 692, 364 A.2d 186 (1975); *State v. Hafner,* 168 Conn. 230, 362 A.2d 925 (1975), *cert. denied* 423 U.S. 851, 96 S. Ct. 95, 46 L. Ed. 2d 74. Since the tape itself was available for the jury, there was no prejudice to the defendant. There was no evidence to indicate the prosecutor acted in bad faith.

The defendant contends that the sentence was excessive. A sentence imposed within the statutory limits will not be overturned on appeal absent an abuse of discretion by the trial court. *State v. True,* 210 Neb. 701, 316 N.W.2d 623 (1982). The sentence was within the statutory range for Class II felonies. The minimum is 1 year and the maximum sentence is 50 years' imprisonment. See Neb. Rev. Stat. §§ 28-201(4), 28-105(1) (Reissue 1979).

The defendant is 40 years of age. He has a long prior record which includes several convictions and imprisonment for auto theft. In view of the violent and serious nature of the crime, there was no abuse of discretion in the imposition of the sentence.

The judgment is affirmed.

AFFIRMED.

GALYEN PETROLEUM COMPANY, A CORPORATION, APPELLANT, V. NORMAN J. HIXSON, DOING BUSINESS AS HIXSON SKELLY SERVICE, AND COMMERCIAL BANK, BASSETT, NEBRASKA, A CORPORATION, APPELLEES.

331 N.W.2d 1

Filed March 11, 1983. No. 82-001.

1. **Summary Judgment.** The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of cases in which there is no genuine claim or defense.
2. **Banks and Banking.** A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it. Neb. U.C.C. § 3-409(1) (Reissue 1980).
3. _____. A check, of itself, and in the absence of special circumstances, is neither a legal nor an equitable assignment or appropriation of a corresponding amount of the drawer's funds in the hands of the drawee, and it gives the holder of the check no right of action against the drawee, even though the drawer has on deposit sufficient funds to pay it.

Appeal from the District Court for Rock County: HENRY F. REIMER, Judge. Affirmed.

Arlen D. Magnuson, for appellant.

Cronin, Hannon & Symonds, for appellee Bank.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and SPRAGUE, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Plaintiff, Galyen Petroleum Company (Galyen), appeals a summary judgment in favor of the Commercial Bank (Bank) of Bassett, Nebraska, in a suit to recover on three checks personally presented to drawee Bank by payee Galyen, upon which payment was refused, although the drawer had funds on deposit to pay some of the checks.

Galyen was a wholesale supplier of fuels to the defendant, Norman J. Hixson, who had an account in and owed Bank more than $7,000 on promissory notes. On October 1, 1975, Hixson issued check No. 2287, $3,763.25, to Galyen, which was presented

through channels to drawee Bank for collection and returned unpaid for insufficient funds. On October 15, 1975, Hixson issued check No. 2304, $2,740.88, to Galyen, which was likewise presented and returned. On November 1, 1975, Hixson issued check No. 2324, $378.94, to Galyen, which was likewise presented and returned. On November 12 and 13, 1975, Galyen personally presented the three checks to Bank during regular banking hours at Bassett, Nebraska; upon each presentment, Bank unconditionally refused payment of all three checks and forthwith returned them to Galyen. Bank's records and the evidence show that at the close of business on November 10, 1975, Hixson's account had a credit balance of $3,048.46. There was no account activity on November 11, 1975. On November 12, three deposits were made to the account, $209.27, $92.90, and $443.17. After Galyen presented the checks for collection on November 12, Bank set off Hixson's account for two items of $1,006.75 and $2,700 that were credited to Hixson's note account, leaving a balance of $87.05. The credited notes were not then due. The printed part of the notes recite in part: "Payee shall have at all times a security interest in and right of set-off against any deposit balances of the maker(s) . . . and may at the time, without notice, apply the same against payment of this note . . . whether due or not . . . ." Bank had a financing statement and security agreement from Hixson dated March 7, 1975. Hixson did not object to the setoffs. Galyen filed its petition on August 23, 1976. Hixson was discharged as a bankrupt on December 7, 1976, and dismissed as a party defendant.

Galyen claims that summary judgment was not a proper remedy here for the reason there were genuine issues of material fact concerning Bank's transactions on November 12 and 13.

Our law relating to summary judgment is well established. "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admis-

sions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Neb. Rev. Stat. § 25-1332 (Reissue 1979).

"The primary purpose of the summary judgment statute is to pierce sham pleadings and to further dispose of cases where there is no genuine claim or defense." *Brown v. Nebraska P.P. Dist.*, 209 Neb. 61, 64, 306 N.W.2d 167, 169 (1981).

From a full review of the record, including depositions and Bank's records, there is no conflict in the evidence, and there is no genuine issue of any material fact.

Galyen assigns as error that Bank unlawfully refused payment of the checks on presentment and that it had no authority to make a setoff to credit Hixson's promissory notes where (1) the notes were not due and (2) the setoffs were exercised after presentment.

Neb. U.C.C. § 3-409(1) (Reissue 1980) provides: "A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it."

"The authorities are agreed . . . that a check, of itself, and in the absence of special circumstances, is neither a legal nor an equitable assignment or appropriation of a corresponding amount of the drawer's funds in the hands of the drawee, and that therefore, in and of itself, it gives the holder of the check no right of action against the drawee and no valid claim to the fund of the drawer in its hands, even though the drawer has on deposit sufficient funds to pay it. It creates no lien on the money which the holder can enforce against the bank." 10 Am. Jur. 2d *Banks* § 563 at 532-33 (1963).

There are no special circumstances or agreements claimed here. The only evidence was the hearsay statement of Richard W. Galyen that Hixson told

him that he had telephoned Bank and that the checks were good.

Summary judgment was a proper procedure here, and Galyen had no standing or cause of action against Bank on account of the dishonor of any of the three checks. It did have a remedy against the drawer. Neb. U.C.C. § 3-507(2) (Reissue 1980). We do not get to the question of setoffs. The summary judgment was properly granted.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT PATTERSON, APPELLANT.

331 N.W.2d 500

Filed March 11, 1983. No. 82-179.

1. **Criminal Law: Hypnosis.** Direct evidence obtained by reason of hypnosis is inadmissible per se.
2. **Witnesses: Hypnosis.** A witness will not be rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case; rather, the witness will be permitted to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, provided that there is sufficient evidence to satisfy the court that the evidence was known and related prior to hypnosis.
3. **Circumstantial Evidence.** One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt.
4. **Sentences: Appeal and Error.** An order denying probation and a sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Larry E. Butler, Buffalo County Public Defender, for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

KRIVOSHA, C.J.

In the case of *State v. Palmer,* 210 Neb. 206, 218, 313 N.W.2d 648, 655 (1981), this court, joining with a growing number of other jurisdictions, held that "until hypnosis gains acceptance to the point where experts in the field widely share the view that memories are accurately improved without undue danger of distortion, delusion, or fantasy, a witness who has been previously questioned under hypnosis may not testify in a criminal proceeding concerning the subject matter adduced at the pretrial hypnotic interview." The instant appeal presents to us the further question as to whether a witness who has been subjected to hypnosis may testify under any circumstances as to matters adduced prior to hypnosis. In the instant case the trial court permitted such testimony. For reasons which we more particularly set out in this opinion, we believe the trial court was correct under the circumstances and we affirm the judgment.

The appellant, Robert Patterson, was convicted of sexually assaulting a 21-year-old Kearney State College student during the early morning hours of June 3, 1981, in Kearney, Buffalo County, Nebraska, in violation of Neb. Rev. Stat. § 28-319 (Reissue 1979). Following trial and conviction, Patterson was sentenced to a term of imprisonment in the Nebraska Penal and Correctional Complex for not less than 5 nor more than 10 years. The evidence was to the effect that after the victim of the attack had completed working at a local restaurant at approximately 1 a.m., she changed into her jogging clothes and started to jog home, a trip which normally took 7 minutes. As she was jogging home she was attacked by a male assailant. For our purposes it is unnecessary to set out in detail the facts of the assault, except to say that, if believed by the jury, the

facts were sufficient to establish that the victim was forcibly knocked to the ground and sexually assaulted. While the assault was taking place, a car entered upon the street where the assault was occurring. The victim screamed. The car pulled up to the house next to where the victim and her assailant were located, and the assailant got up and ran off to the northeast. The occupants of the car, a man and a woman, got out of the car and assisted the victim into the house.

At the trial, the male occupant of the automobile testified that as he turned onto the street he saw something going on in his front yard. As he drove closer he saw that it was two individuals engaged in what appeared to be a sexual act and he heard screams. As he stopped his car he observed the male assailant flee, and he and his female occupant assisted the victim into the house.

Two officers of the Kearney Police Department testified at trial that within a few minutes of receiving a call concerning the assault they went to the eyewitnesses' home where the victim was. Inside the house one of the officers interviewed the victim, who told him what had occurred and gave him a clear description of the assailant. The second officer likewise testified that he arrived shortly after the first officer and while the first officer was still interviewing the victim. The victim was then taken to a local hospital where, according to her roommate who arrived shortly thereafter, she again related the incident and described the assailant.

A further interview was held with the victim by the police the following afternoon, where, again, the victim was interviewed by a detective of the Kearney Police Department. The victim once again related what had occurred and described her assailant as best she could remember. Her description fit the appellant, although she could not positively identify him. Written police reports of the inter-

views were prepared at or shortly after the interviews and were available at trial.

During the initial investigation, shortly after the assault, one of the officers searched the area where the assault had occurred and found a set of keys belonging to the victim, which she said were in her hand at the time the attack occurred. Also found near the keys were some auction house receipts and a cash register slip bearing numbers later identified as having been issued to Patterson. The officer went to the auction house with the receipts and determined that Patterson had been at the auction house on the evening of June 2, 1981, and had purchased the seven or eight items for which the receipts were issued. An employee of the auction house testified that Patterson returned the next day and attempted to pick up the items which he had purchased the previous evening. He was unable to produce his receipts and told the employee that he had lost the receipts. In court the employee identified the receipts and cash register slip which the officer had found. During a conversation with one of the officers, Patterson admitted that he had lost both his checkbook and the auction receipts to the things he had bought at the auction house the previous night, but did not know where he had lost them. Patterson was thereafter arrested and charged with the crime.

On June 23, 1981, the victim was placed under hypnosis by a clinical psychologist. While under hypnosis, she again related all of the matters which she had previously related to the police officers and to her roommate. The only additional matter adduced as a result of the hypnosis was a description of an automobile. The automobile turned out to be of no material consequence in the trial.

Following the hypnotic session the victim was shown eight men in a lineup, including Patterson. She was unable to identify Patterson as her assailant

and, in fact, never positively identified Patterson as her assailant.

Patterson argues that by reason of our holding in *State v. Palmer,* 210 Neb. 206, 313 N.W.2d 648 (1981), the victim in this case was precluded from testifying as to any matters involving the crime which were discussed during the hypnotic session, even though the evidence is clear and convincing that the victim related all of the matters to others long before she was placed under hypnosis. Unlike the situation in *Palmer,* no previously unknown facts were adduced during the hypnotic session.

We can begin our analysis of this problem by stating that direct evidence obtained solely by reason of hypnosis is inadmissible per se. See *State v. Palmer, supra.* That, however, is not the issue presented to us in this appeal. The question is not whether evidence previously unknown and adduced by reason of hypnosis is admissible but, rather, whether evidence obtained without the benefit of hypnosis and clearly admissible becomes inadmissible simply by reason of the fact that, after relating the facts to a number of witnesses, the facts are once again related to one who purports to be able to hypnotize the witness.

In *State v. Palmer, supra,* we pointed out that there were two lines of authority and that we opted to join those jurisdictions which made hypnotically induced testimony inadmissible per se. Among those jurisdictions are Minnesota, *State v. Mack,* 292 N.W.2d 764 (Minn. 1980); Arizona, *State v. Mena,* 128 Ariz. 226, 624 P.2d 1274 (1981); and Michigan, *People v. Gonzales,* 108 Mich. App. 145, 310 N.W.2d 306 (1981).

The rationale of those cases was that hypnosis can create a memory of perceptions which did not previously exist and therefore may bring forth a memory of events which were nonexistent but which may become fixed in the witness' mind so that the witness believes them to be true after hypnosis. But

that rationale falls short when examining memories for which there is ample support for their previous existence. To assert that such memory is the product of hypnosis is to simply ignore the reality of the matter.

Since our decision in *State v. Palmer, supra,* Minnesota, Arizona, and Michigan have been presented with the question of the admissibility of prehypnotic testimony. In *State ex rel. Collins v. Superior Court, Etc.,* 132 Ariz. 180, 644 P.2d 1266 (1982), the Arizona court, after affirming its position on the inadmissibility of hypnotically induced testimony, said at 209, 644 P.2d at 1295: "[O]ur review of the literature and the position of law enforcement experts, lead us to conclude that hypnosis is generally accepted as a reliable investigative tool by the relevant scientific community. When used for prompting recall in order to provide valuable leads for investigation, hypnosis has less serious risks than the problems the technique presents when courtroom testimony is involved. Unlike a jury, an investigator need not make subjective evaluations of the truth or falsity of the hypnotic recall. He need only obtain leads for the purpose of subsequent investigation and verification.

"As a practical matter, if we are to maintain the rule of incompetency, the police will seldom dare to use hypnosis as an investigatory tool because they will thereby risk making the witness incompetent if it is later determined that the testimony of that witness is essential. Thus, applying the *Frye* test of general acceptance and weighing the benefit against the risk, we modify our previous decision and hold that a witness will not be rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case. That witness will be permitted to testify with regard to those matters which he or she was able to recall *and* relate prior to hypnosis. Thus, for example, the rape victim would be free to testify to the occurrence of the crime, the

lack of consent, the injury inflicted and the like, assuming that such matters were remembered and related to the authorities prior to use of hypnosis."

The Arizona court observed that other courts which, like Arizona, had adopted a per se rule of inadmissibility have since modified that rule to permit prehypnotic testimony to be admitted in evidence when such evidence was obtained prior to the hypnosis. See, *Com. v. Taylor,* 294 Pa. Super. 179, 439 A.2d 805 (1982); *People v. Wallach,* 110 Mich. App. 37, 312 N.W.2d 387 (1981); *State v. Koehler,* 312 N.W.2d 108 (Minn. 1981); *State v. Blanchard,* 315 N.W.2d 427 (Minn. 1982); *People v. Jackson,* 114 Mich. App. 649, 319 N.W.2d 613 (1982); *Strong v. State,* ____ Ind. ____, 435 N.E.2d 969 (1982); *People v. Hughes,* 88 A.D.2d 17, 452 N.Y.S.2d 929 (1982).

We believe that such a rule would be consistent with our position in *Palmer,* in view of the fact that we specifically said in *Palmer* that hypnosis may be used for investigatory purposes and that testimony obtained as a result of leads supplied during such hypnotic investigation was admissible. We therefore now hold that a witness will not be rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case; rather, the witness will be permitted to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, provided that there is sufficient evidence to satisfy the court that the evidence was known and related prior to hypnosis. How the court is to be satisfied must be determined on a case-by-case basis, and the authorities must therefore determine whether using hypnosis is worth the possible risk.

In this case the evidence is overwhelming that the commission of the assault, the lack of consent, and the description of the assailant were all known to the victim prior to her being subjected to hypnosis and were fully and adequately related to and reported by her to a host of law enforcement officers, as well as

others. It is clear that her memory of the events was not created by hypnosis. If the purpose of rendering hypnotically induced testimony inadmissible per se is to refuse to make that which is uncertain certain and admissible, it appears to follow, as day follows night, that evidence which is otherwise reliable and admissible should not thereby be rendered inadmissible because, after having been fully related and recorded, it is once more repeated during a purported hypnotic session. Patterson's assignment of error in this regard is overruled.

Patterson raises a second error concerning the State's failure to produce evidence previously ordered by the court. In an order entered by the court on August 20, 1981, the State was ordered to permit Patterson to discover "all reports or results of scientific tests and experiments made in connection with this case" and "all information in the possession of the County Attorney" which Patterson could use as favorable evidence. It appears from the evidence that a laboratory test was conducted on the keys belonging to the victim and found near the scene of the assault. The results of that test disclosed that there was no skin or blood on the keys and therefore the test was essentially negative. The State, however, failed to advise Patterson of this fact. Normally that would be reversible error and is a practice which should not be followed by the State. *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). An order of the court requiring the State to make such information available must be followed. However, in the instant case there is simply no prejudice entitling Patterson to a reversal of his conviction. The victim was unable to testify with certainty that in fact she had scratched her assailant with the keys. Also, the officers who questioned Patterson later in the day on June 3 were in disagreement as to whether Patterson displayed a scratch on his arm. One said he may have seen a red mark which had not bled, while the other was

unable to say. There was no testimony by anyone that the assailant was scratched or that the keys should possess evidence of skin or blood. Therefore, the failure of the State to disclose that evidence in the instant case was not material and did not in any manner prejudice Patterson, entitling him to a new trial. See, *Evans v. Janing,* 489 F.2d 470 (8th Cir. 1973); *State v. Boyer,* 211 Neb. 139, 318 N.W.2d 60 (1982); *State v. Seger,* 191 Neb. 760, 217 N.W.2d 828 (1974).

Patterson further claims that the trial court erred in not sustaining his motion for directed verdict made at the close of the State's case. We do not agree. The evidence presented by the State, if not rebutted, was sufficient to permit the jury to find guilt beyond a reasonable doubt. The most damaging evidence, besides the victim's description of Patterson, was the auction house receipts issued to Patterson and found at the scene of the crime. Admittedly, the evidence was circumstantial. That does not, however, preclude a finding of guilt. One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt. *State v. Buchanan,* 210 Neb. 20, 312 N.W.2d 684 (1981). It is not for this court to weigh the evidence when reviewing a criminal conviction. That is for the trier of facts. *State v. Carter,* 205 Neb. 407, 288 N.W.2d 35 (1980). Patterson's assignment of error in this regard must also be overruled.

Finally, Patterson argues the sentence was excessive. Under the circumstances, we believe not. Patterson's previous criminal record, taken together with the facts of this case, makes the sentence well within appropriate guidelines, and the sentence imposed fails to disclose any abuse of discretion. It has long been the rule that an order denying probation and a sentence imposed within statutorily pre-

scribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge. *State v. Roubideaux,* 199 Neb. 251, 257 N.W.2d 828 (1977); *State v. Welsh,* 202 Neb. 249, 275 N.W.2d 54 (1979); *State v. True,* 210 Neb. 701, 316 N.W.2d 623 (1982). The assignment is overruled.

For these reasons the conviction and sentence are in all respects affirmed.

AFFIRMED.

CLINTON, J., not participating.

WHITE, J., dissenting.

Without addressing the issue of confabulation that concerned us in *State v. Palmer,* 210 Neb. 206, 313 N.W.2d 648 (1981), the majority now retreats from the square holding in that case, that if the subject was brought up in a hypnotic session, the witness cannot be permitted to testify about the subject matter at trial. The opinion in *Palmer* fully explored the consequences of that holding. I am not convinced that the concerns we there expressed have now magically vanished. I would reverse.

I am authorized to state that McCown, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. FRANK C. ANDERSEN, APPELLANT.

331 N.W.2d 507

Filed March 11, 1983. No. 82-182.

1. **Miranda Rights.** The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
2. _____. The admission of statements obtained in violation of *Miranda* may nevertheless be considered harmless error not re-

quiring reversal of an otherwise valid conviction. For the error to be prejudicial and require reversal, the court must find that the jury would have found the State's case significantly less persuasive had the disputed testimony been excluded.

3. **Jury Instructions.** The repetition of an instruction is not reversible error unless its effect is to mislead the jury.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Richard L. Kuhlman, for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

KRIVOSHA, C.J.

The appellant, Frank C. Andersen, was convicted by a jury in the county court of Dodge County, Nebraska, of operating or having actual physical control of a motor vehicle while under the influence of alcoholic liquor or while having ten-hundredths of one percent or more by weight of alcohol in his body fluid as shown by chemical analysis of his breath, contrary to the provisions of Neb. Rev. Stat. § 39-669.07 (Reissue 1978). By reason of this being Andersen's second offense, the trial court sentenced him to 90 days in jail and suspended his driver's license for a period of 1 year. Andersen appealed the conviction to the District Court for Dodge County, Nebraska, which affirmed the conviction and sentence previously entered by the county court. He then perfected his appeal to this court.

While his assignments of error are 12 in number, when regrouped they are essentially as follows: He first complains that the trial court erred in admitting into evidence, over Andersen's objection, Andersen's own statement to the police officer that he had been celebrating getting off of probation for driving while intoxicated. He further assigns as error the fact that the trial court permitted the

introduction into evidence of the results of certain portions of a breath analyzer test without first giving Andersen notice that such results would be offered in evidence. A third assignment of error concerns the giving of two instructions concerning driving while intoxicated. And, lastly, Andersen maintains that the evidence was insufficient to sustain the finding of guilt. Our examination of the record compels us to affirm.

The record reveals that at approximately 8:25 p.m. on March 15, 1981, a vehicle driven by Andersen was observed by a Fremont police officer, Priscilla Seyboth. At the time, the Andersen vehicle was going east on Linden Street at approximately 5 m.p.h. After stopping at an intersection the Andersen vehicle made a left turn onto Clarkson Street. Officer Seyboth then observed that the vehicle was being driven on the grassy area between the street and the sidewalk and that only the wheels on the driver's side of the vehicle were in the street. Andersen continued to drive the vehicle over the curb for approximately one-half of a block. There was no other traffic on Clarkson Street at that time.

After observing this behavior Officer Seyboth pulled up behind the Andersen vehicle and turned on the overhead flashing lights on her vehicle. Andersen gave no indication that he saw the police car behind him and, instead, moved into the left turn lane on Clarkson at its 16th Street intersection. He then made a left turn onto 16th Street, and Officer Seyboth began honking her horn to attract his attention. Andersen finally pulled over about half a block from the intersection.

As Officer Seyboth was approaching the Andersen vehicle, she observed Andersen attempt to get out of the vehicle and almost fall to the ground. She also noted a very strong odor of alcohol on Andersen. Andersen was unable to find his driver's license in his wallet after fumbling with it for several minutes. Andersen told Officer Seyboth that he had been

driving his vehicle up out of the street in order to avoid traffic.

Officer Seyboth then asked Andersen to perform four field sobriety tests. He was unable to perform the balance test without swaying or staggering, and was unable to complete the heel-to-toe test after three attempts. A test requiring him to pick up a key ring while standing on one leg was demonstrated by Officer Seyboth to Andersen. He was unable to stand on one leg and he completely missed the key ring. When asked to close his eyes and touch the tip of his nose with his index finger, he was unable to comply.

Officer Seyboth then took Andersen back to the police cruiser and asked him to sit in the front seat. After she read the preliminary test advisement to Andersen, he agreed to submit to an Alco-Sensor test. While the officer and Andersen were sitting in the cruiser, prior to Andersen taking the Alco-Sensor test, Officer Seyboth asked Andersen if he had been drinking. He responded that he had just been celebrating getting off of probation for driving while intoxicated. The State concedes that Andersen had not been given a *Miranda* warning by Officer Seyboth before the inquiry was made. After waiting a requisite 15 minutes, Officer Seyboth administered the Alco-Sensor test. The device registered "fail," and Officer Seyboth informed Andersen that he was under arrest.

Andersen was then taken to the Fremont police station by Officer Seyboth. Officer Lutes read an implied consent advisement form to Andersen, who agreed to submit to a gas chromatograph test. The purpose of the test is to determine the percentage of alcohol in the body fluid of an individual. The machine was prepared in accordance with the technique previously approved by the State of Nebraska, Department of Health, including a test to check the calibration of the machine, using a known standard. After explaining the test to Andersen the test was

administered and a digital reading of .261 was obtained. The officer switched the machine to "standby" and obtained a graphic readout. Andersen was then taken to the station's holding cell.

During the trial in the county court the result of the breath test conducted at the police station was admitted into evidence over Andersen's objection. Also admitted in evidence was the statement made by Andersen to Officer Seyboth concerning his reason for drinking that evening. In addition to the result of the breath test, there was likewise offered in evidence all of the additional testimony concerning Andersen's erratic driving and his inability to perform any of the field sobriety tests. There was also evidence to the effect that there was a very strong odor of alcohol present on Andersen, that his speech was slurred, that his eyes were bloodshot, and that he nearly fell to the ground getting out of his vehicle.

Officer Tamke, the officer in charge of maintenance and calibration for the Fremont Police Department, testified at the trial about the procedures used in calibrating the equipment used to conduct the test on Andersen. The equipment was an Intoximeter Mark IV gas chromatograph. Officer Tamke also testified concerning the NALCO standard solution used to test the accuracy of the machine. He stated, without contradiction, that the device was in good working order on March 15, 1981, when the test was administered to Andersen.

Andersen testified in his own defense at the trial. He claimed that his total alcohol intake on March 15, 1981, consisted of half a can of beer and a swallow of whiskey. He maintained that a prior injury to his legs was the reason for his inability to perform the field sobriety test. He further testified that the steering mechanism on his vehicle was damaged, thereby causing the erratic driving observed by Officer Seyboth.

We turn first to Andersen's claim that the result of the breath test administered at the police station

should not have been admitted in evidence because the State failed to satisfy certain foundational requirements as set out in our opinion in *State v. Gerber,* 206 Neb. 75, 291 N.W.2d 403 (1980). In the *Gerber* case we said at 90-91, 291 N.W.2d at 411-12: "[B]efore the State may offer in evidence the results of a breath test for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, the State must prove the following: (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with any statutory requirements."

Though Andersen argues that the State failed to establish the second, third, and fourth requirements of the *Gerber* test, the record clearly establishes the contrary. Andersen's assertion that Officer Seyboth lacked sufficient knowledge of alcohol chemistry or test variables to accurately perform a breath test by using the Mark IV equipment is simply without merit. The State produced evidence that Seyboth was properly qualified and on March 15, 1981, held a valid permit issued by the Department of Health. She testified that she had passed both written and practical examinations in order to obtain the permit. Neither the Department of Health nor the law in the State of Nebraska requires that persons administering such tests must be graduate chemists; they merely must have "some knowledge of the chemistry of alcohol and of other substances of proper concern." This knowledge is shown by the individual successfully completing a written examina-

tion given by the Department of Health. The evidence establishes that Officer Seyboth satisfied the requirements of the Department of Health and properly obtained a permit authorizing her to administer the test.

Andersen next asserts that the test was not properly conducted in accordance with a method currently approved by the Department of Health. The testimony of both Officer Seyboth and Officer Tamke is clearly to the contrary. Both officers testified in detail as to the procedures followed in administering the test and in calibrating the machine. The checklist used by Officer Seyboth to document the steps is one approved and prescribed by the rules of the Department of Health of the State of Nebraska. Andersen does not tell us how the State failed to comply with the fourth requirement of the *Gerber* test, and the evidence proves otherwise. The assignment of error is simply without merit and the trial court properly admitted the result of the Intoximeter test into evidence.

Andersen's claim concerning the admissibility of his statement to Officer Seyboth concerning the reason for his drinking that evening presents a more difficult problem, though not for any reason raised by Andersen. After failing the field sobriety tests Andersen was taken by Officer Seyboth to the police cruiser for a preliminary breath test. The evidence seems fairly clear that Andersen was not free at that point to leave and therefore was in custody. Without advising Andersen of his constitutional rights Officer Seyboth interrogated him concerning whether he had been drinking. This procedure would appear to be directly contrary to the requirements set out in *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and reaffirmed by our own decisions, including our recent decision in *State v. Thunder Hawk,* 212 Neb. 350, 322 N.W.2d 669 (1982). In *Miranda* the U.S. Supreme Court said at 444: "[T]he prosecution may not use statements, whether

exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." It seems clear from the evidence that at the time Officer Seyboth made inquiry of Andersen, Andersen was then, if not in custody, certainly otherwise deprived of his freedom of action in a significant way. The State's contention that the question was merely a part of an "on-the-scene investigation," not requiring the officer to advise Andersen of his rights, is simply erroneous.

Our finding, however, that a *Miranda* violation has occurred does not resolve the question, for it is well established that the admission of statements obtained in violation of *Miranda* may nevertheless be considered harmless error not requiring reversal of an otherwise valid conviction. See, *Harryman v. Estelle,* 616 F.2d 870 (5th Cir. 1980); *United States v. Cheung Kin Ping,* 555 F.2d 1069 (2d Cir. 1977); *Smith v. Estelle,* 519 F.2d 1267 (5th Cir. 1975); *Reed v. Wolff,* 511 F.2d 1369 (8th Cir. 1975); *Palmer v. State,* 604 P.2d 1106 (Alaska 1979).

As the cases cited illustrate, a finding of constitutional error in a case of this nature does not require an automatic reversal unless there appears from the evidence a reasonable possibility that the evidence complained of might have contributed to the conviction. See, *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *Fahy v. Connecticut,* 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963). For the error to be prejudicial and require reversal, we must find that the jury would have found the State's case significantly less persuasive had the disputed testimony been excluded. *Schneble v. Florida,* 405 U.S. 427, 92 S. Ct.

1056, 31 L. Ed. 2d 340 (1972); *Harrington v. California,* 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969). In this regard, the court must look to the record for independent evidence of guilt. *Milton v. Wainwright,* 407 U.S. 371, 92 S. Ct. 2174, 33 L. Ed. 2d 1 (1972). The court must then decide whether the error was harmless beyond a reasonable doubt. See *Chapman v. California, supra.*

In the instant case the State adduced testimony, absent Andersen's own statement, which established guilt beyond a reasonable doubt. When one considers the evidence concerning Andersen's manner of driving, his physical appearance and behavior, and the result of the Intoximeter test, no other result could have reasonably been reached but that of guilty. To say that the evidence against Andersen was overwhelming is to understate the State's case. Andersen's admission to Officer Seyboth as to the reason why he was in the condition he was in at the time of his arrest was, at most, cumulative, and a review of the record leaves no reasonable doubt that the jury would have reached the same verdict without the testimony concerning Andersen's statement.

The Alaska Supreme Court was presented a similar question in *Palmer v. State, supra.* After stopping the defendant's car the arresting officer, before formally placing him under arrest, asked him how much he had drunk. The defendant replied that he had had five or six beers. This exchange occurred before the driver was advised of his right to remain silent. In affirming the conviction, the Alaska court stated at 1111: "Assuming, *arguendo,* that there was a *Miranda* violation, we conclude that the statement, if it was incriminating, merely corroborated other evidence at trial which, standing alone, would have been more than sufficient to convict Palmer of the offense charged. If it was error to admit the statement, such error was harmless beyond a reasonable doubt, since we see no reasonable

possibility that the evidence contributed to the jury's verdict."

Based upon the evidence in this case we must therefore find that while a violation of Andersen's rights occurred, it was without prejudice and thereby does not entitle him to a reversal.

Andersen further contends that error was committed because the court permitted the introduction into evidence of the tests used in calibrating the gas chromatograph without first notifying the defendant that such tests would be offered in evidence. Andersen argues that exhibit 9, which was a standard alcohol solution certification sent to the Fremont Police Department by the Nebraska Department of Health along with the solution used by the Fremont Police Department in calibrating the gas chromatograph, and exhibit 10, which was the record made by Officer Tamke when he ran the 10 tests on the NALCO to determine its target value, constitute one of the exceptions to the hearsay rule, see Neb. Rev. Stat. § 27-803(7) (Reissue 1979), and requires the giving of reasonable notice to the opposing party before the evidence may be offered at trial. In this regard, Andersen is simply in error. Exhibits 9 and 10 were among a number of documents submitted by the State in laying foundation for the introduction of the result of the gas chromatograph test on Andersen and were submitted in conjunction with detailed testimony by Tamke as to the procedures he followed in maintaining and calibrating the gas chromatograph as a regular part of his duties. They were not offered as an exception to the hearsay rule. Tamke was present and subject to cross-examination. Under the provisions of Neb. Rev. Stat. § 27-801(3) (Reissue 1979), hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Exhibits 9 and 10 were not documents included within the definition of § 27-803(7), and notice was not required to

be given by the State to Andersen. For that reason, permitting the exhibits to be introduced in evidence in support of the witness' testimony was not error.

Andersen further assigns as error several of the jury instructions given by the trial court. He alleges that by giving two separate instructions defining "under the influence of alcoholic liquor," the trial court confused and misled the jury. There is simply no basis for that claim. We have previously stated that the repetition of an instruction is not reversible error unless its effect is to mislead the jury. *State v. Suggett,* 189 Neb. 714, 204 N.W.2d 793 (1973). Here, the instructions were correct statements of the applicable law and could in no way mislead the jury. Likewise, instruction No. 11, concerning credibility of the witnesses, is a direct statement from NJI 14.81, ¶¶ 1-7, 10-11. We find no error in the giving of this instruction.

Our review of the record satisfies us that there was no prejudicial error committed in connection with the trial in the county court, and the verdict of the jury is amply sustained by the evidence. The judgment of the District Court affirming the action of the county court is affirmed.

AFFIRMED.

JACK GREENWOOD, JR., ET AL., APPELLANTS, V. TURNER GRAIN COMPANY ET AL., APPELLEES.

330 N.W.2d 925

Filed March 11, 1983. No. 82-242.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Ralph A. Bradley, for appellants.

Ronald S. DePue of McDermott, Depue & McDermott, for appellees.

BOSLAUGH, WHITE, and CAPORALE, JJ., and BRODKEY, J., Retired, and GRANT, D.J.

BOSLAUGH, J.

This action was commenced to recover the net proceeds from the sale of approximately 6,000 bushels of corn delivered to the defendant Turner Grain Company by the plaintiffs Jack Greenwood, Jr., and Cory Greenwood. Pursuant to a stipulation of the parties, the proceeds were paid into the court and the action was dismissed as to the grain company. The plaintiff Phyllis Greenwood disclaimed any interest in the proceeds and the action was dismissed as to her. The record indicates the defendant Ethel Greenwood also disclaimed any interest in the proceeds and the action was dismissed as to her.

The plaintiffs are sons of the defendant Jack Greenwood, Sr. For a number of years prior to 1980 they had been employed by their father in farming land owned and rented by him. In January 1980 the defendant proposed to his sons that they each sign a farm lease with him on separate 80-acre tracts which he had been renting. Jack Greenwood, Jr., and his father signed a lease for land rented from B. J. Cunningham, Jr. Cory Greenwood and his father signed a lease for land rented from Evelyn Leonard. Jack Greenwood, Sr., paid the first one-half of the cash rent due on each tract. The understanding was that each son would pay the second one-half of the cash rent and the crop from each tract would be divided equally between the lessees. There was no understanding as to how the other expenses of farming the tracts would be divided.

The boys were to be paid an hourly wage for their services on the other land owned and rented by the defendant.

According to the defendant, at the request of each plaintiff, the oral understanding was modified in February 1980 so that instead of a share of the crop on the two 80-acre tracts, the plaintiffs would each

receive a salary or wage for their services. When the second one-half of the cash rent came due on the Cunningham and Leonard tracts, it was paid by the defendant.

At harvest time the plaintiffs delivered the crop from one-half of the Cunningham tract and the Leonard tract, amounting to approximately 6,000 bushels of corn, to the grain company.

The defendant admits that he is still indebted to Cory Greenwood in some amount for salary or wages. He claims that he has made a settlement with Jack Greenwood, Jr., and has paid him in full.

The plaintiffs claimed that they were entitled to the proceeds because of the leases they signed with their father. The defendant denied that the plaintiffs had an interest in the proceeds and alleged that the grain delivered to the grain company was his property. By cross-petition the defendant claimed that the wrongful acts of the plaintiffs forced him to default on contracts for future delivery of grain and that, as a result, he was damaged in the amount of $10,000.

The trial court found that the defendant Jack Greenwood, Sr., was entitled to the proceeds of the corn delivered to Turner Grain Company but that he was not entitled to recover on the cross-petition. The plaintiffs have appealed.

The action, essentially, is one in contract, an action at law. The decision of the trial court was equivalent to the verdict of a jury and will not be disturbed unless clearly wrong. In determining whether the evidence is sufficient to sustain the judgment, it must be considered in the light most favorable to the defendant, all conflicts must be resolved in his favor, and he is entitled to the benefit of all inferences that reasonably may be deduced from the evidence. *Atlas Steel & Wire Corp. v. L & M Constr. Chemicals, Inc.*, 212 Neb. 16, 321 N.W.2d 64 (1982).

The evidence was in direct conflict. The defend-

ant testified that Cory told him on February 6, 1980, that Cory would rather work for wages than have a share of the crop. Several weeks later Jack Jr. called the defendant and stated that he could not afford to pay the cash rent and had to have an income payable every 2 weeks. They agreed upon a salary of $1,500 per month.

Jack Jr. testified that the salary of $1,500 per month was to be in addition to his share of one-half of the crop from the Cunningham 80 and that the agreement was made before he signed the lease. Cory testified that he was to receive $3.75 per hour payable weekly or every other week, but that he was to receive a share of the crop instead of wages for farming the Leonard 80. Cory denied that there had been any further discussion with his father concerning a change in his oral contract of employment.

The evidence was sufficient to support the findings of the trial court, and the judgment must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WALTER L. SIMS, APPELLANT.

331 N.W.2d 255

Filed March 11, 1983. No. 82-397.

1. **Homicide: Photographs.** In a homicide case photographs of the victim, upon proper foundation, may be received in evidence for the purpose of identification, to show the condition of the body, to show the nature and extent of the wounds and injuries, and to establish malice or intent.
2. _____: _____. A photograph which illustrates or makes clear some controverted issue in a homicide case may be received in evidence even if it is gruesome.
3. **Photographs.** The admission into evidence of a gruesome photograph rests in the sound discretion of the trial court, which must determine its relevancy and weigh its probative value against its possible prejudicial effect.

4. **Rules of Evidence.** Neb. Rev. Stat. § 27-405 (Reissue 1979) permits evidence of specific instances of conduct where character is an essential element of a defense.
5. **Appeal and Error.** Error may not be predicated upon a ruling which excludes evidence unless a substantial right of a party is affected.
6. **Sentences.** Whenever a court considers a sentence for an offender convicted of a felony, the court may withhold a sentence of imprisonment unless, among other things, a lesser sentence will depreciate the seriousness of the crime or promote disrespect for the law.
7. **Sentences: Appeal and Error.** A sentence imposed by the trial court within the statutory limits will not be disturbed on appeal unless there has been an abuse of discretion.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

M. Robert Fromkin and David L. Herzog, P.C., for appellant.

Paul L. Douglas, Attorney General, and Frank J. Hutfless, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

CAPORALE, J.

Defendant-appellant, Walter L. Sims, was charged with second degree murder; the intentional but unpremeditated killing of Gregory S. Combs. A jury found defendant guilty of the lesser-included offense of manslaughter, the unintentional killing of Combs. The trial court adjudged the defendant guilty pursuant to the jury's verdict and imposed a prison sentence of from 5 to 10 years. We affirm.

Defendant assigns three errors, namely, that the trial court erred in (1) admitting into evidence an allegedly gruesome and prejudicial photograph which had no probative value as to any controverted fact, (2) excluding proof probative of the fact that the decedent was the first aggressor and of decedent's violent and dangerous nature, and (3) abusing its discretion by denying probation and imposing an excessive period of imprisonment.

The defendant, a 44-year-old Omahan, planned and promoted an amateur fashion show in the summer of 1981, which was held on September 3, 1981, at his lounge known as "Walt's Bar." The participants included, among others, one Conchita Johnson and the deceased Combs. During rehearsals on September 1, 1981, Combs and Johnson were involved in an altercation wherein Combs struck and injured Johnson. As a consequence, defendant notified both that they would not be allowed to participate in the show. This was at least in part because the defendant thought it was disrespectful of Johnson to have called the police to his establishment. However, both Johnson and Combs did participate in the show and also came to the party held after the show's conclusion for the participants and others. The party was held at the apartment above defendant's other lounge, the State Bar, at which one Clarence Vaughn resided.

Johnson testified that prior to arriving at the party, Combs had assaulted her outside a downtown Omaha restaurant but denied he had a gun; however, an eyewitness gave testimony that Combs did have a gun. At the party Johnson and Combs once again became involved in an argument. First Vaughn, and then defendant and others, approached Combs and sought to eject him from the premises. Several parties became aware of the fact during this time that Combs had a gun in the waistband of his pants. Vaughn, Alfred McGee, and Gail Hepburn, as well as the defendant, testified that Combs threatened to kill defendant. Johnson testified it was defendant who threatened to kill Combs. Anthony Tate heard defendant say to decedent, "But you don't pull no pistol on me." According to Tate, upon making that statement, defendant pulled a gun and shot the decedent. On the other hand, an off-duty policeman who was a guest at the party, Isaiah Jackson, Jr., testified that Combs broke away while being led out. Jackson thereupon attempted to take

the gun from Combs but was unsuccessful. McGee testified that Jackson then yelled out, "He's got a gun." After Jackson's warning and during the scuffle which ensued, a shot rang out, which struck Combs. The defendant then left the premises, but within a few hours voluntarily accompanied Jackson to police headquarters. Police Sergeant Cousin testified that after initially denying involvement, defendant verbally admitted to him the shooting of Combs, but in self-defense. At trial, however, he testified that he did not pull the trigger and that his gun went off accidentally.

We now turn our attention to defendant's first assignment of error. The color photograph in question is 8 inches by 10 inches in size and exhibits the upper part of decedent's body, with eyes closed, draped in white sheets. Some bloodstains are visible, as is a medical cut above the decedent's heart made in an effort to revive him; the photograph also shows two tubes in the body's mouth. Defendant argues that inasmuch as it was stipulated that he, defendant, had shot the decedent and caused the death, the photograph had no probative value as to any controverted fact. We agree with the defendant that the receipt into evidence of an item for "whatever it's worth" does not render worthless evidence probative and therefore properly admissible. Although we recently cautioned against the overuse of gruesome photographs in *State v. Jones, ante* p. 1, 328 N.W.2d 166 (1982), we restated that in a homicide case photographs of the victim, upon proper foundation, may be received in evidence for the purpose of identification, to show the condition of the body, to show the nature and extent of the wounds and injuries, and to establish malice or intent. A photograph which illustrates or makes clear some controverted issue in a homicide case may be received even if it is gruesome. The admission into evidence of a gruesome photograph rests in the sound discretion of the trial court, which must determine its

relevancy and weigh its probative value against its possible prejudicial effect. The photograph in question, given the nature of photographs of crime victims, is not gruesome. Moreover, this was the only photograph of the decedent admitted into evidence and was used by the pathologist in describing where the bullet had struck, the chest; this fact is relevant to the issue of whether the shot was fired in self-defense. The trial court did not abuse its discretion by admitting the photograph into evidence.

Defendant next complains because the trial court did not permit Johnson to testify that she did not pursue the September 1, 1981, assault upon her by the decedent with the police because she feared he would have beaten her "like a dog," as he had beaten Kathy Binns. It is defendant's position that such testimony should have been admitted to support his claim that the decedent was violent and combative and had been the first aggressor, under the provision of Neb. Rev. Stat. § 27-405 (Reissue 1979), which reads: "(1) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

"(2) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct." Cases decided by this court prior to the adoption of the foregoing statute in 1975 hold that, where relevant, evidence of a homicide victim's propensity for violence ordinarily is admissible only in the form of reputation testimony. See, *State v. Ralls,* 192 Neb. 621, 223 N.W.2d 432 (1974); *State v. Kimbrough,* 173 Neb. 873, 115 N.W.2d 422 (1962). We conclude, however, that the language of § 27-405(2) changes that rule when character is an essential element of a "charge, claim, or defense." See, *United States v. Powers,*

622 F.2d 317 (8th Cir. 1980), *cert. denied* 449 U.S. 837, 101 S. Ct. 112, 66 L. Ed. 2d 44; *United States v. Giese,* 597 F.2d 1170 (9th Cir. 1979), *cert. denied* 444 U.S. 979, 100 S. Ct. 480, 62 L. Ed. 2d 405; and *United States v. Pantone,* 609 F.2d 675 (3d Cir. 1979), interpreting Fed. R. Evid. 405, identical in language to § 27-405, to permit evidence of specific instances of conduct where character is an essential element of a defense. Sims defended on the basis he shot in self-defense; that is, his actions were justified because he used only such force as he believed necessary to protect himself pursuant to the provisions of Neb. Rev. Stat. § 28-1409 (Reissue 1979). In order to excuse or justify a killing in self-defense, the accused must have entertained a reasonable and good faith belief his life was in great danger or that he was in danger of suffering great bodily harm. Thus, the proffered Johnson testimony was relevant to, and probative of, the question as to whether decedent was the first aggressor. The trial court therefore erred in not admitting that testimony. That finding does not, however, resolve the issue. For when error has occurred, a determination must always be made as to whether the error was prejudicial. See, Neb. Rev. Stat. § 27-103 (Reissue 1979), stating that error may not be predicated upon a ruling which excludes evidence unless a substantial right of a party is affected, and Neb. Rev. Stat. § 29-2308 (Reissue 1979), providing that no judgment in a criminal case shall be set aside or new trial granted because of the rejection of evidence, unless a substantial miscarriage of justice has actually occurred. These statutory rules find expression in cases such as *State v. Andersen, ante* p. 695, 331 N.W.2d 507 (1983), and *State v. Van Ackeren,* 194 Neb. 650, 235 N.W.2d 210 (1975).

The proffered testimony was cumulative. There was ample evidence before the jury to establish, if it chose to so find, that the decedent was violent and aggressive and that he was indeed the first aggres-

sor. In view of the cumulative nature of the excluded evidence, we conclude the error was harmless beyond a reasonable doubt. See, *Milton v. Wainwright,* 407 U.S. 371, 92 S. Ct. 2174, 33 L. Ed. 2d 1 (1972); *Schneble v. Florida,* 405 U.S. 427, 92 S. Ct. 1056, 31 L. Ed. 2d 340 (1972); *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), *rehearing denied* 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241; *United States v. Ledesma,* 632 F.2d 670 (7th Cir. 1980), *cert. denied* 449 U.S. 998, 101 S. Ct. 539, 66 L. Ed. 2d 296.

This then brings us to defendant's third and final assignment of error. Manslaughter is a Class III felony, for the conviction of which one may be sentenced to from 1 to 20 years' imprisonment, assessed a $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1979). Although it is true that defendant has a relatively clean past record, the presentence report considered by the trial court reveals that defendant was convicted of petit larceny in 1959 and was convicted for sale of liquor without a license in 1969. In 1966 he was charged with carrying a concealed weapon; although no disposition is shown pertaining to that instance, the record does indicate defendant forfeited his bond.

Albeit unintentionally, defendant nonetheless destroyed another human life. Neb. Rev. Stat. § 29-2260 (Reissue 1979) provides that whenever a court considers a sentence for an offender convicted of a felony, the court may withhold a sentence of imprisonment unless, among other things, a lesser sentence will depreciate the seriousness of the crime or promote disrespect for the law. No one can argue but that the taking of life is a serious offense; to treat it lightly would both depreciate the seriousness of the crime and promote disrespect for the law. In any event, as we have said many times in the past, a sentence imposed by the trial court within the statutory limits will not be disturbed on appeal unless there has been an abuse of discretion.

State v. Komor, ante p. 376, 329 N.W.2d 120 (1983); *State v. Schmidt, ante* p. 126, 327 N.W.2d 624 (1982); *State v. Glover,* 207 Neb. 487, 299 N.W.2d 445 (1980). No abuse of discretion appears here.

The judgment and sentence of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. JAMES E. LEVERING, APPELLEE.

331 N.W.2d 505

Filed March 11, 1983. No. 82-438.

Criminal Law: Hypnosis. Posthypnotic testimony of a victim which relates to matters which such victim was able to recall and relate prior to the hypnosis and as to which there is sufficient reliable recorded evidence to satisfy the court that such facts were known and related by the victim prior to hypnosis is admissible at trial.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Exceptions sustained.

Donald L. Knowles, Douglas County Attorney, S. W. Cooper, and Charles Campbell, for appellant.

Thomas M. Kenney, Douglas County Public Defender, and Michael F. Gutowski, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

HASTINGS, J.

This is a proceeding in error under Neb. Rev. Stat. § 29-2315.01 (Reissue 1979). Its purpose is to review the orders of the District Court in suppressing the testimony of the alleged robbery victim, Donald Playfoot, and of Deputy Sheriff Linda Valencia, in proceedings preliminary to trial. The defendant, James E. Levering, was charged with an August 24, 1981, robbery in Omaha. The State assigns as error the suppressing of the posthypnotic testimony of the

victim, as well as his testimony as to those events recalled and recorded prior to the hypnotic session. No error is assigned in suppressing the testimony of the deputy sheriff, although we will be required to discuss her testimony in order to resolve this appeal.

According to the victim's testimony, on August 24, 1981, his home in Omaha was entered by three black males who robbed him of property of value. After the robbers left he reported the incident to the Douglas County sheriff's department, and they sent Linda Valencia to take his report. As part of the suppression hearing, the State offered the testimony of Deputy Valencia as to what the victim had reported, as well as the written report itself, all of which were rejected by the court as hearsay. An offer of proof was made in the nature of the deputy sheriff's report itself, which was also rejected.

That report, dated August 24, 1981, contained a rather detailed description of the robbery of the victim. In addition, Deputy Sheriff William W. Black took a supplemental report from the victim on that same date, which was testified to by the officer at a suppression hearing. In that report the victim was quoted as saying that at approximately 12:30 a.m. he was reading in bed when he and his wife became aware of the presence of three armed, black males. He described in some detail the instructions given him by these intruders, including their demand that he show them where his money was located. During the remainder of the time while these three men were ransacking the house, he recalled the repeated demands made upon him not to look at their faces. He detailed the various items of property taken, then described the three men to the deputy sheriff as to age, height, and build, and in some instances furnished other characteristics of the alleged robbers.

The victim himself testified that on August 28, 1981, at the request of the sheriff's department, he was subjected to a hypnotic interview. According to

the testimony of Dr. George Bartholow, a licensed psychiatrist familiar with the use of hypnosis, he believes hypnosis to be a valuable tool in order to enhance and refresh memory. It was his opinion that the deputy sheriff who conducted the hypnotic interview was qualified to induce a hypnotic state, and from an examination of the recorded interview it was his judgment that the interview conducted with the victim was "excellent," and he saw no examples of leading questions or planting information.

As a result of the hypnotic interview, the victim was able to identify two of the men as having robbed him, one of whom was the defendant. According to the cassette tapes of the hypnotic interview, the facts of the alleged robbery were discussed in great detail, including the fact of the robbery and that it was perpetrated by three black men.

Both parties in their briefs agree that at the trial, held on April 30, 1982, neither the testimony of the victim nor of the deputy sheriff who took his initial report was permitted because of the suppression orders under consideration here. Also, a defense motion to dismiss due to insufficiency of the evidence was sustained in spite of the fact that the confession of the defendant was received in evidence.

It is apparent that the trial court sustained the defense motion to dismiss because the State failed to prove the corpus delecti. This could have been proved by testimony of the victim that he was robbed by three black men. That evidence, together with the defendant's confession, undoubtedly could have resulted in the defendant's conviction. That particular testimony of the victim, if permitted, would have related only to matters which he was able to recall and relate prior to hypnosis as to which there was sufficient evidence in the form of the deputy sheriff's report to satisfy the court that such evidence was known and related by the victim prior to hypnosis. That particular testimony should

not have been suppressed. See *State v. Patterson, ante* p. 686, 331 N.W.2d 500 (1983).

We therefore conclude that the orders of the District Court suppressing that evidence were erroneous and the exceptions must be sustained.

EXCEPTIONS SUSTAINED.

WHITE, J., dissenting.

For the reasons stated in the dissent in *State v. Patterson, ante* p. 686, 331 N.W.2d 500 (1983), I dissent.

MCCOWN, J., joins in this dissent.

STATE OF NEBRASKA, APPELLANT, V. PERRY J. FAVERO, APPELLEE.

331 N.W.2d 259

Filed March 11, 1983. No. 82-778.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed.

Michael G. Heavican, Lancaster County Attorney, John A. Colborn, and Jan W. Sharp, for appellant.

Dennis R. Keefe, Lancaster County Public Defender, and Sean J. Brennan, for appellee.

WHITE, J.

This is an appeal by the State of Nebraska pursuant to Neb. Rev. Stat. § 29-116 (Cum. Supp. 1982) from an order of the District Court for Lancaster County, Nebraska, suppressing certain oral statements made by the defendant to a detective of the Lincoln Police Department. The statements made were in connection with the alleged participation of the defendant in the attempted second degree murder of Charles Ashley and the use of a deadly weapon in the commission of a felony. Reversed.

The standard of review in this case is that the finding of the trial court that statements or confes-

sions were or were not intelligently or voluntarily made will not be set aside on appeal unless the finding is clearly erroneous. *State v. Irwin,* 191 Neb. 169, 214 N.W.2d 595 (1974); *State v. Prim,* 201 Neb. 279, 267 N.W.2d 193 (1978).

The defendant is presently charged and awaiting trial in the Lancaster County District Court on the two above-mentioned felony counts. On August 26, 1982, the defendant filed a motion to suppress any and all statements made by him at the time of and subsequent to his arrest. At the hearing on the motion to suppress, the parties stipulated that the statements were taken from the defendant in violation of his constitutional rights to remain silent and to consult with an attorney prior to and during questioning. Thus, the State conceded that the defendant's statements were inadmissible in its case in chief. However, the State maintained that the statements were admissible evidence for impeachment purposes should the defendant testify at trial. The trial court granted the motion to suppress and held that the statements could not be used for any purpose. The State appeals, seeking review of that order.

The evidence reveals that on April 29, 1982, at approximately 4 p.m., Detective Larry E. Barksdale began an interview with the defendant. Barksdale told the defendant that the two other people who were arrested in connection with the attempted murder of Charles Ashley were making statements to the effect that the defendant was responsible for the offense. Barksdale also told the defendant that evidence had been found near the scene and that there was a good possibility that he was going to jail.

After asking the defendant whether he would make a statement or answer questions in relation to the attempted murder of Charles Ashley, Barksdale read the defendant the *Miranda* warnings at approximately 4:40 p.m. The defendant refused to make a statement and requested an attorney. Barksdale continued questioning and the defendant

stated that he wanted to tell what had happened but felt he should have an attorney present before doing so. No steps were taken to obtain an attorney, and Barksdale continued questioning and stated that as long as an attorney was not present, any statement made could not be used as an admission in court, so the defendant could tell him "off the record" what his side of the story was. The defendant then proceeded to relate how he had beaten Charles Ashley in retaliation for homosexual acts committed on the defendant's person.

In *Harris v. New York,* 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971), the U.S. Supreme Court held that a statement that was inadmissible against the defendant in the prosecution's case in chief because of the failure of the police to give the defendant *Miranda* warnings could be used for impeachment to attack the credibility of the defendant's trial testimony. In *Harris* the defendant failed to make a claim that the statements made to police were coerced or involuntary.

In *Oregon v. Hass,* 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975), Hass was given *Miranda* warnings after his arrest. He requested that he be allowed to telephone an attorney but was told he could not do so until arrival at the police station. He then provided inculpatory information which was later suppressed. In *Hass* the Court pointed out that the only possible distinction between *Harris* and the case before it was the fact that the *Miranda* warnings given Hass were proper, whereas those given Harris were defective. The Court stated at 723: "The deterrence of the exclusionary rule, of course, lies in the necessity to give the warnings. That these warnings, in a given case, may prove to be incomplete, and therefore defective, as in *Harris,* does not mean that they have not served as a deterrent to the officer who is not then aware of their defect; and to the officer who is aware of the defect the full deterrence remains. The effect of inadmissibility in

the *Harris* case and in this case is the same: inadmissibility would pervert the constitutional right into a right to falsify free from the embarrassment of impeachment evidence from the defendant's own mouth." The *Hass* court reaffirmed *Harris*, which held that having denied making the statements, evidence of those statements may be used to impeach that denial. The *Hass* court also indicated the analysis which would be used in dealing with police abuse of the *Miranda* process. The Court stated that "If, in a given case, the officer's conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness." *Hass* at 723.

Unlike the defendants in *Harris* and *Hass,* the defendants in *Mincey v. Arizona,* 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), and *New Jersey v. Portash,* 440 U.S. 450, 99 S. Ct. 1292, 59 L. Ed. 2d 501 (1979), challenged the use of their statements for impeachment purposes with claims that the statements were not voluntary.

In *Mincey* the defendant had been wounded and was in a hospital receiving treatment at the time he was interrogated. While in severe pain and in a state of confusion, the defendant stated that he wished to remain silent and consult with an attorney. Mincey's request was ignored and questioning continued until a statement was obtained. The State of Arizona used the statement to impeach the defendant when he took the stand to testify in his behalf. In reversing the conviction the U.S. Supreme Court found that the statement was not the product of a free will and rational intellect and therefore was not voluntary. The *Mincey* court concluded that the impeachment use of the defendant's involuntary statements violated due process. In reaching its determination, the *Mincey* court stated at 401: "There were not present in this case some of the gross abuses that have led the Court in other cases to find

confessions involuntary, such as beatings . . . or 'truth serums,'. . . . But 'the blood of the accused is not the only hallmark of an unconstitutional inquisition.' . . . Determination of whether a statement is involuntary 'requires more than a mere color-matching of cases.' . . . It requires careful evaluation of all the circumstances of the interrogation."

In *Portash, supra,* the defendant testified at a grand jury hearing pursuant to a grant of immunity after first expressing an intention to assert his privilege against self-incrimination. The defendant was subsequently prosecuted and testified at his trial inconsistently with his grand jury testimony. The grand jury testimony was then utilized to impeach his trial testimony and he appealed. The *Portash* court noted that in *Harris* and *Hass* the process used in determining whether the impeachment evidence was properly admitted amounted to a balance between an attempt to deter police illegality and the need to prevent perjury. Referring to *Harris* and *Hass,* the *Portash* court stated at 458-59: "In both cases the Court weighed the incremental deterrence of police illegality against the strong policy against countenancing perjury. In the balance, use of the incriminating statements for impeachment purposes prevailed. The State asks that we apply the same reasoning to this case. It points out that the interest in preventing perjury is just as strongly involved, and that the statements made to the grand jury are at least as reliable as those made by the defendants in *Harris* and *Hass.*

"But the State has overlooked a crucial distinction between those cases and this one. In *Harris* and *Hass* the Court expressly noted that the defendant made 'no claim that the statements made to the police were coerced or involuntary,' . . . . That recognition was central to the decisions in those cases.

"The Fifth and Fourteenth Amendments provide that no person 'shall be *compelled* in any criminal

case to be a witness against himself.' As we reaffirmed last Term, a defendant's compelled statements, as opposed to statements taken in violation of *Miranda*, may not be put to any testimonial use whatever against him in a criminal trial. 'But *any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law.' "

This court in *State v. Bazis,* 190 Neb. 586, 210 N.W.2d 919 (1973), followed the rule as set forth in *Harris.* See, also, *State v. Escamilla,* 195 Neb. 558, 239 N.W.2d 270 (1976). However, once the right to counsel is invoked, the rule in *Harris* becomes hard to reconcile with our decision in *In re Interest of Durand,* 206 Neb. 415, 420, 293 N.W.2d 383, 387 (1980), in which we stated: "If a suspect is told he has a right to have an attorney present during interrogation and he chooses to cut off questioning until counsel can be obtained, his choice must be 'scrupulously honored' by the police." The *Harris* rule also conflicts with the U.S. Supreme Court's decisions in *Edwards v. Arizona,* 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), stating that once the right to counsel is exercised by the accused, the interrogation must cease until an attorney is present, and *Brooks v. Tennessee,* 406 U.S. 605, 612, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972), in which the Court remarked that "Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right."

The facts in the present case are no different from those in *In re Interest of Durand, supra,* except that the statement is offered for impeachment purposes. After the defendant demanded an attorney for the second time, the detective ignored the defendant's request in an attempt to gather impeachment material. The defendant was assured that his statement could not be used against him as a confession or admission and that the detective just wanted to hear his side of the story "off the record."

The U.S. Supreme Court was well aware that this

type of illegal police conduct would occur when it stated in *Oregon v. Hass,* 420 U.S. 714, 723, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975), that "One might concede that when proper *Miranda* warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material."

Therefore, utilizing the test set forth in *Portash,* I must find that the facts of the instant case do not reveal a compelled involuntary statement of the type condemned in *Mincey* and *Portash.* In fact, the trial court found the statement was freely and voluntarily made but that the questioning procedure used by the detective had "an unfairness about it that violates, at least in this Court's mind, the concept of due process." The precise unfairness mentioned by the trial court is within the exceptions to *Miranda* contemplated by *Harris* and *Hass* and apparently did not persuade the majority in those cases to exclude the statements as impeachment evidence.

It may well be necessary, in view of the decisions of the U.S. Supreme Court which have considerably weakened the once absolute strictures of *Miranda,* for this court to reconsider our recent statements in *State v. Harper,* 208 Neb. 568, 304 N.W.2d 663 (1981), and to formulate, as have a number of the states, a state constitutional basis to deal with police conduct violative of *Miranda.* However, this determination should be made by the court and not by one judge of the court. Therefore, in light of the U.S. Supreme Court's rulings on the subject and this court's reluctance to extend the Nebraska constitutional requirements beyond those rulings, see *State v. Harper, supra,* the order of the trial court suppressing the statement is clearly erroneous and must be reversed.

REVERSED.

Cite as 213 Neb. 725

ROBERT E. PARMENTER, APPELLANT, V. DAVID R. JOHNSON, APPELLEE.

331 N.W.2d 263

Filed March 18, 1983. No. 44540.

1. **Negligence: Juries.** In determining whether the evidence is sufficient to submit the issues of negligence or contributory negligence of an opposing party to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and to have the benefit of every reasonable inference that may be deduced from the evidence. If reasonable minds might draw different conclusions from the set of facts thus resolved, the issues of negligence or contributory negligence are for a jury.
2. **Motor Vehicles: Rules of the Road.** A driver approaching an intersection on the right of an oncoming vehicle may not proceed in disregard of the surrounding circumstances and, where necessary to avoid a collision, may be required to yield the right-of-way.
3. _____: _____. A driver approaching an unprotected intersection where he knows or can observe that his view is obstructed must have his vehicle under such control as will give him a reasonable opportunity to react to a situation he does or could observe.
4. _____: _____. The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way. He must keep a lookout in the direction from which others may be expected to approach.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Jim Zimmerman of Atkins, Ferguson, Hahn, Zimmerman & Carney, for appellant.

Michael J. Javoronok of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellee.

KRIVOSHA, C.J., HASTINGS, and CAPORALE, JJ., and DAVIS, D.J., and COLWELL, D.J., Retired.

DAVIS, D.J.

The appellant, plaintiff below, appeals a verdict and judgment for the appellee in a negligence action for injuries claimed from a collision between vehicles operated by the parties which occurred in an uncontrolled intersection of two roads in Melbeta,

Nebraska, during the day of January 25, 1975.

The trial court directed a verdict against the appellee on the issue of liability and instructed the jury on the issues of the appellant's contributory and comparative negligence, using Nebraska Jury Instructions on lookout, control, and right-of-way.

The evidence showed that just prior to the accident the appellant was operating his vehicle to the east on a two-lane gravel surfaced road at a speed of approximately 15 miles per hour. The appellee was operating his vehicle to the south on a two-lane road at 15 to 20 miles per hour, according to his testimony.

The appellant, a local resident, testified that he had used the road many times on trips from his farm to town and was familiar with the intersection.

The appellant testified that he believed he saw the appellee shortly after his earliest opportunity to do so, but stated that his vision to the north was somewhat obstructed by a house and trees on the northwest corner of the intersection. The appellee's vehicle was approximately one-half block to the north of the intersection when it was first seen by the appellant, and at that time the appellant's vehicle was 40 or 50 feet to the west of the intersection.

The appellant testified that when he first saw the appellee he realized that he could not cross the intersection safely, based upon his estimate of the speed at which the appellee was approaching. He applied his brakes hard, and testified that his truck stopped at or shortly before impact, with its front end at a point approximately 10 feet into the intersection and 1 foot into the southbound traffic lane.

The right front corner of the appellee's truck struck the left front corner of the appellant's truck.

The appellee testified that he did not see the appellant's vehicle until he had approached within 10 feet of it, at which time he applied his brakes but was unable to stop before impact.

The appellant argues that because he saw the ap-

pellee's oncoming vehicle within a short distance of his earliest opportunity to do so and that because he applied and locked his brakes prior to impact, he met the requirements of lookout and reasonable control as a matter of law, and that the trial court erred in submitting these issues to the jury, along with the issue of his right-of-way.

In determining whether the evidence is sufficient to submit the issues of negligence or contributory negligence of an opposing party to a jury, a party is entitled to have all conflicts in the evidence resolved in his favor and to have the benefit of every reasonable inference that may be deduced from the evidence. If reasonable minds might draw different conclusions from the facts thus resolved, the issues of negligence or contributory negligence are for a jury. *Pearson v. Richard,* 201 Neb. 621, 271 N.W.2d 326 (1978).

Here, because of the appellant's speed as a function of control, see NJI 7.03, a reasonable inference arises that he had no alternative but to enter the intersection, regardless of what his observation may have disclosed, when he reached a position from which he could see an oncoming vehicle to his left. *Crink v. Northern Nat. Gas Co.,* 200 Neb. 460, 263 N.W.2d 857 (1978); *Hodgson v. Gladem,* 187 Neb. 736, 193 N.W.2d 779 (1972).

Given the evidence of the respective speeds of the vehicles involved, the semiobstructed nature of the intersection, the appellant's familiarity with it, as well as his testimony as to the point at which he first observed or could have observed the appellee's vehicle, a jury question existed as to the adequacy of the appellant's lookout. *Pearson v. Richards, supra; Crink v. Northern Nat. Gas Co., supra; Hodgson v. Gladem, supra; Jones v. Consumers Coop. Propane Co.,* 186 Neb. 629, 185 N.W.2d 458 (1971).

Based upon the evidence of the location and speed of the vehicles involved, the trial court properly submitted to the jury the question of right-of-way.

Crink v. Northern Nat. Gas Co., supra; Pearson v. Richard, supra.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

KAREN L. MUIR, APPELLEE, V. ROCKNEY L. MUIR, APPELLANT.

331 N.W.2d 265

Filed March 18, 1983. No. 81-903.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Affirmed.

Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellant.

Chesley S. Baker of Lauritsen, Baker & Brownell, for appellee.

BOSLAUGH, CLINTON, and HASTINGS, JJ., and CAMBRIDGE, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

This appeal involves a domestic relations matter.

This court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

CLINTON, J., not participating.

RUTH E. RASKIN AND BERNARD H. RASKIN, APPELLANTS, V. SELDIN DEVELOPMENT & MANAGEMENT COMPANY, A CORPORATION, MILLARD R. SELDIN, THEODORE M. SELDIN, STANLEY C. SILVERMAN, AND NORMA R. SILVERMAN, APPELLEES.

331 N.W.2d 783

Filed March 18, 1983. No. 82-034.

Damages. It is the duty of the District Court to refrain from submitting to a jury the issue of damages when the evidence is such that it cannot determine such issue except by indulging in speculation and conjecture.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed.

Martin A. Cannon of Matthews, Cannon & Riedmann, P.C., for appellants.

John W. Delehant and James D. Sherrets of Kutak Rock & Huie, for appellees.

KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

HOWARD, D.J.

Plaintiffs in an action for breach of contract appeal from the trial court's dismissal of the petition at the close of plaintiffs' case. The only parties signatory to the contract are the plaintiffs and Millard R. Seldin, Theodore M. Seldin, and Stanley C. Silverman. For reasons unexplained, Norma R. Silverman and Seldin Development & Management Company are also named parties defendant.

The plaintiffs and the defendants were in 1972 owners of varying shares in eight corporations. Plaintiffs were stockholders in five, which owned income-producing assets. Beginning in 1971, Bernard and "the brothers," Millard, Theodore, and Stanley, began to plan the merger of the eight corporations into a new successor corporation, Seldin Development & Management Company (SDM). The formation of SDM included not only the assets of the eight corpo-

rations but also individual partnership assets contributed by Bernard and the brothers in varying amounts, described as "motel operations."

The initial capitalization of SDM was to be $100,000, consisting of 1,000,000 shares of $.10 par common, of which the Raskins were to receive 11.8 percent for a total of 118,000 shares. It was initially contemplated that the individual stockholders would offer to the public on a pro rata basis a total of 225,000 shares, namely, 22½ percent of their 1,000,000 shares. Assuming a public offering price of $14 per share, the Raskins, on a pro rata offering of 22½ percent of their 118,000 shares, would have received $371,700. In addition to the 225,000 stockholder shares to be sold for profit, it was also contemplated that SDM would issue and sell 75,000 new shares for corporation expansion and payment of high-interest debt. At $14 per share the offering would be apportioned:

Stockholders:	225,000 @ $14 =	$3,150,000
SDM:	75,000 @ $14 =	1,050,000
		$4,200,000

In March 1972, at the time the merger was being finalized, the Raskins negotiated with the brothers for an arrangement whereby the Raskins would sell out all of their shares if there was a public offering. If the price was right, the Raskins were willing to sell out and retire. The Raskins wanted a price of $1,000,000. Since the anticipated public price was to be $14 per share, this required the reduction of the Raskin shares from 118,000 to 71,429, because $14 × 71,429 = $1,000,006. The agreement provided that the other signatory parties would pay to the Raskins any shortage if the price received should be less than $14 per share.

There was concern about the consequences if the contemplated registration and public offering should not, in the event, take place. For reasons which will become apparent, we do not detail the evidence or respond to the arguments concerning the negoti-

ations between the Raskins and the brothers as bearing upon the meaning of the provision in the contract finally adopted: "If said contemplated registration and public offering does not take place by September 30, 1972 (regardless of the reason), then all covenants, terms and conditions of this Agreement shall automatically become void, and the parties will return to their respective stock ownership status prior to the merger." During the period between April and July of 1972 the market for stock deteriorated. It was anticipated that the public offering would be underwritten by a broker on a firm underwriting basis which would guarantee a specific price to the sellers at the risk of the underwriter. Although there was talk of a possible market at $14, and later at $9 per share, the undisputed fact is that the broker never offered any underwriting contract at any price; thus, the public offering never took place by the September 30, 1972, deadline or thereafter. The Raskins were restored to an 11.8 percent ownership in SDM, and earnings of over $53,000 for the first fiscal year ending June 30, 1973, were distributed to the Raskins, based upon their restored ownership of 118,000 shares in SDM. The additional shares were specifically demanded on July 12, 1973, by the Raskins' attorney.

Plaintiffs' theory is that either they are entitled to have the now extinguished corporations somehow reconstituted and their stock interests in those corporations restored (which they concede to be an impossibility) or that they should be awarded judgment of $1,000,006. The plaintiffs overlook the fact that no defendant was obliged to pay any amount to them (except the shortage below $14 per share if, and only if, the offering of shares should be underwritten). If plaintiffs have a cause of action it is for breach of contract. If the alleged breach is for failure to deliver shares of stock, "the measure of recovery . . . is the value of the stock at the time of the breach." *Katleman v. Leon's, Inc.*, 110 Neb. 129,

133, 193 N.W. 254, 255 (1923). No evidence of any kind was offered on the value of the Raskin shares in the five merged corporations at the time of the alleged breach. Additionally, an essential but missing factor in any calculation of damages is the value of the Raskins' 118,000-share interest in SDM and their earnings therefrom. If plaintiffs have sustained damages by whatever measure, it is their duty to present some evidence from which the amount can be reasonably computed. "It is the duty of the district court to refrain from submitting to a jury the issue of damages when the evidence is such that it cannot determine such issue except by indulging in speculation and conjecture." *Midlands Transp. Co. v. Apple Lines, Inc.*, 188 Neb. 435, 440, 197 N.W.2d 646, 649 (1972).

Defendants' motion to dismiss was grounded both on a failure to prove liability and on a failure to prove damages. Because of the view we take of the second ground, we need not consider the first. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

MICHAEL A. ENYEART, APPELLANT, V. STEVEN P. SWARTZ, APPELLEE.

331 N.W.2d 513

Filed March 18, 1983. No. 82-073.

1. **Jury Instructions: Appeal and Error.** It is uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to specific acts so alleged and supported. The failure to do so, even though not requested, is error.
2. _____: _____. Ordinarily, a failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection thereafter.
3. _____: _____. Noncompliance by counsel with the requirement that he object to a proposed jury instruction when it is submitted to

him does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice.

4. **Jury Instructions.** It is the duty of the trial court, whether requested to do so or not, to submit to and properly instruct the jury on all material issues presented by the pleadings and supported by the evidence.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Jeffrey A. Silver, for appellant.

Jerry J. Milner of Grimminger, Milner & Lamberty, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and BUCKLEY, D.J., and COLWELL, D.J., Retired.

BUCKLEY, D.J.

This action results from a motor vehicle accident on September 7, 1978, at the intersection of Eddy and West Fourth Streets in Grand Island, Nebraska. Plaintiff-appellant, in his petition, and defendant-appellee, in his counterclaim, alleged damages resulting from the other driver's negligence. Neither party alleged contributory negligence as an affirmative defense.

Trial was had to a jury, which found against both parties on their respective claims. Defendant filed a motion for a new trial, which was sustained, and from that order plaintiff appeals.

Plaintiff was operating an automobile and the defendant a motorcycle. Plaintiff was proceeding north on Eddy Street and was attempting a left turn in the intersection when the defendant, proceeding in the opposite direction on Eddy Street, collided with him. Neither driver saw the other before the collision. It was between dusk and dark at the time and the evidence varied as to the need to have headlights on. Plaintiff's headlights were on; whether defendant's headlight was on was in conflict. Issues of negligence as to reasonable control and proper lookout were properly submitted to the jury.

Although the trial court did not specify its reasons for granting a new trial, both parties concede by their briefs and oral arguments that the only apparent issue is whether the jury was adequately instructed as to right-of-way.

Defendant's allegations of plaintiff's negligence included the charge that plaintiff failed to yield the right-of-way. Right-of-way is defined in the statutory Nebraska Rules of the Road as "the right of one vehicle or pedestrian to proceed in a lawful manner in preference to another vehicle or pedestrian approaching under such circumstances of direction, speed, and proximity as to give rise to danger of collision unless one grants precedence to the other." Neb. Rev. Stat. § 39-602(80) (Reissue 1978).

Further, Neb. Rev. Stat. § 39-636 (Reissue 1978) provides that "The driver of a vehicle who intends to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard."

The trial court did instruct the jury that the defendant charged the plaintiff with the specific act of negligence in failing to yield the right-of-way, and it did submit the standard instruction on lookout and reasonable control, which advises the jury that a motorist has a duty to keep a proper lookout and watch where he is driving, even though he has the right-of-way. However, the instructions did not define right-of-way, nor did they submit the left turn statutory rule of the road embodied in § 39-636, nor did they instruct the jury in any other manner as to the rights and duties of a motorist intending to make a left turn at an intersection.

It is the uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to specific acts so alleged and supported.

The failure to do so, even though not requested, is error. *Pool v. Romatzke,* 177 Neb. 870, 131 N.W.2d 593 (1964); *Herman v. Midland Ag Service, Inc.,* 200 Neb. 356, 264 N.W.2d 161 (1978). The instructions given were wholly lacking in any advice to the jury as to what facts and circumstances would entitle either party to the right-of-way. They provided no guidance to the jury to determine which party had the right-of-way over the other as they approached and entered the intersection. The failure to so instruct is clearly prejudicial error.

Plaintiff, however, contends that even if the court should have so instructed, no request for any instructions was made by defendant at the instruction conference and, therefore, he cannot object now. The trial court did hold an instruction conference at which each of the instructions given were reviewed. The court neither invited nor did counsel tender any requested instructions. Counsel for defendant in his brief claims that he requested the statutory left turn instruction prior to the instruction conference, but there is no record of it.

It is true that, ordinarily, a failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection thereafter. *McCready v. Al Eighmy Dodge,* 197 Neb. 684, 250 N.W.2d 640 (1977). However, in that case we also said that such noncompliance by counsel does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice. In addition thereto, we do not intend to abrogate the long-standing rule that it is the duty of the trial court, whether requested to do so or not, to submit to and properly instruct the jury on all material issues presented by the pleadings and supported by the evidence. This fundamental duty of the trial court has not been altered by our rule adopted in 1969, which formalized the trial court's instruction conference. *Herman v. Midland Ag Service, Inc., supra; Pool v. Romatzke, supra.*

Here, the instructions given were correct as far as they went. Therefore, it was not defendant's failure to object to the instructions given but the trial court's failure to adequately instruct that requires a new trial.

The trial court's order sustaining defendant's motion for new trial was correct and should be affirmed. We also note that the trial court did not instruct the jury on comparative negligence. If, upon retrial of the case, the issue of both plaintiff's and defendant's negligence is submitted to the jury, the comparative negligence instruction should be given.

AFFIRMED.

JOSEPH L. VACCA, ASSIGNEE OF BIEDERMANN & SONS, INC., MONOGRAM OF CALIFORNIA, DECORA IMPORTS, INC., SUNRISE PUBLICATIONS, INC., AND CREATIVE CONCEPTS, APPELLANT, V. ROBERT J. DEJARDINE, R.J.D., INC., W.M., INC., DOING BUSINESS AS THE VIKING SHOP OR THE OTHER VIKING SHOP, APPELLEES.

MIDWEST IMPORTERS OF CANNON FALLS, INC., APPELLANT, V. ROBERT J. DEJARDINE, R.J.D., INC., W.M., INC., DOING BUSINESS AS THE VIKING SHOP OR THE OTHER VIKING SHOP, APPELLEES.

331 N.W.2d 516

Filed March 18, 1983. Nos. 82-132, 82-133.

1. **Default Judgments: Appeal and Error.** An order vacating a default judgment is an appealable order.
2. **Default Judgments.** The matter of the vacation of a default judgment rests in the sound discretion of the trial court, but this discretion is not an arbitrary one and it must be exercised reasonably.
3. _____. In addition to the requirements of Neb. Rev. Stat. § 24-537 (Reissue 1979), a party seeking to vacate a default judgment must also tender an answer or other proof disclosing a meritorious defense.
4. _____. Before imposing the sanction of entering a default judgment against a party who has failed to serve answers to interrogatories as provided by Neb. Rev. Stat. § 25-1267.44 (Reissue 1979),

the court should first issue an order requiring such party to show cause why such default judgment should not be entered.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Vacca v. DeJardine reversed and remanded with directions to reinstate the original default judgment. Midwest Importers of Cannon Falls, Inc. v. DeJardine affirmed as modified, and remanded with directions.

Joseph L. Vacca of J. L. Vacca & Associates, P.C., for appellants.

Betty L. Egan of Walsh, Walentine, Miles, Fullenkamp & O'Toole, for appellees.

BOSLAUGH, MCCOWN, and HASTINGS, JJ., and BRODKEY, J., Retired, and RIST, D.J.

HASTINGS, J.

These cases are appeals from the District Court for Douglas County, which affirmed two decisions of the municipal court of Omaha, Douglas County, Nebraska. In the municipal court both plaintiffs-appellants moved for and obtained default judgments against the defendants-appellees. On motion of the defendants and payment of costs, these judgments were ordered vacated and set aside. It is from these orders that the plaintiffs appealed to the District Court, which in turn affirmed that action. These appeals followed.

At the outset, both in District Court and here, the defendants insist that the orders vacating the default judgments were not final orders and therefore not appealable. Cited in support of this contention are *Brown v. Edgerton,* 14 Neb. 453, 16 N.W. 474 (1883), and *Roh v. Vitera,* 38 Neb. 333, 56 N.W. 977 (1893). Both of those cases stand for that proposition. However, in *Jones v. Nebraska Blue Cross Hospital Service Assn.,* 175 Neb. 101, 120 N.W.2d 557 (1963), this court squarely held in a similar case that "The order vacating the judgment is an appealable one."

Id. at 102, 120 N.W.2d at 559. We believe that this expresses the better-reasoned rule.

In the case of *Vacca v. DeJardine et al.,* following the filing of a petition a summons was issued showing answer day to be July 30, 1981. On July 31, 1981, the plaintiff appeared in court and showed that the defendants had failed to appear or answer, and obtained a default judgment. On August 24, 1981, on motion of the defendants and payment of costs, the default judgment was set aside and the case set for pretrial on September 23, 1981. To this date, as disclosed by the record, no answer was or has since been filed by the defendants.

Neb. Rev. Stat. § 24-537 (Reissue 1979) provides: "When judgment shall have been rendered against a defendant in his absence, the same may be set aside upon the following conditions: (1) That he pay the costs awarded against him; (2) that his motion be made within thirty days after such judgment was entered; (3) that he notify in writing the opposite party . . . of the opening of such judgment and of the time and place of trial . . . ." However, more is required of a defendant in this situation. In *Steinberg v. Stahlnecker,* 200 Neb. 466, 263 N.W.2d 861 (1978), we affirmed the orders of both the Omaha Municipal Court and the District Court in refusing to set aside a default judgment wherein the defendant had filed nothing but a general denial. We said: "The matter of the vacation of a default judgment rests in the sound discretion of the trial court but this discretion is not an arbitrary one and it must be exercised reasonably. A party seeking to vacate a default judgment must tender an answer or other proof disclosing a meritorious defense." *Id.* at 468, 263 N.W.2d at 863.

Under the circumstances in *Vacca v. DeJardine et al.,* both the municipal court and the District Court abused their discretion in setting aside the default judgment in favor of the plaintiff. Accordingly, that case is reversed and remanded with directions to

reinstate the original default judgment.

In *Midwest Importers of Cannon Falls, Inc. v. DeJardine et al.,* the defendants did file a timely answer to the plaintiff's petition, although they have failed to file any response to an amended petition. However, the default judgment in this case was entered on July 24, 1981, on plaintiff's motion, setting forth that the defendants had failed and neglected to answer or object to interrogatories served on them by the plaintiff. On August 24, 1981 (August 23 having fallen on a Sunday), on motion of the defendants and payment of costs, the default judgment was set aside and the cause set for pretrial on September 23. No order was made regarding the failure to serve and file answers to interrogatories and nothing has been done in that regard to this date.

The statutory provision regarding the failure to answer interrogatories is found in Neb. Rev. Stat. § 25-1267.44 (Reissue 1979). It provides in part as follows: "(4) If a party . . . willfully . . . fails to serve answers to interrogatories . . . after proper service of such interrogatories, the court on motion and notice may . . . enter a judgment by default against that party." Although not directly in point, we find instructive some of the language in *Anoka-Butte Lumber Co. v. Malerbi,* 180 Neb. 256, 142 N.W.2d 314 (1966).

In that case the plaintiff-appellee, upon defendants' appeal from a judgment in county court, had failed to file its petition on appeal within "fifty days from the date of the rendition of such judgment by the justice," as required by Neb. Rev. Stat. § 27-1307 (Reissue 1964). The District Court, on appeal, denied the defendants' motion to nonsuit the plaintiff. We said: "Unless the statute is enforced in some manner by the court, it would be within the power of a litigant to continue the litigation almost without end. Where the provisions of the statute provide for a showing of good cause, good cause must be required. Here, however, there is no such require-

ment. The proper procedure in such situation would appear to be for the appellant to direct the court's attention to the fact that the appellee has not filed a petition on appeal within the time required. The court should then order that the plaintiff be nonsuited unless a petition on appeal is filed within a time specified." *Id.* at 261, 142 N.W.2d at 317.

Applying that rationale to the present case, we believe that had the municipal court not have set aside the default judgment in the face of no order to show cause, it would have been an abuse of discretion, prejudicial to the defendants, requiring reversal. *Von Seggern v. Kassmeier Implement,* 195 Neb. 791, 240 N.W.2d 842 (1976). It therefore follows that the setting aside of the judgment was not an abuse of discretion, and the judgment of the District Court should be affirmed. However, following the teaching of *Anoka-Butte,* the municipal court, in the first instance, instead of granting a default judgment, should have issued an order to the defendants to show cause why such judgment should not be granted because of their failure to file and serve answers. Therefore, the order of affirmance is modified to the extent that on remand the trial court is directed to issue an order to the defendants to show cause within a reasonable time period why a default judgment should not be entered.

VACCA V. DEJARDINE REVERSED AND REMANDED WITH DIRECTIONS TO REINSTATE THE ORIGINAL DEFAULT JUDGMENT.

MIDWEST IMPORTERS OF CANNON FALLS, INC. V. DEJARDINE AFFIRMED AS MODIFIED, AND REMANDED WITH DIRECTIONS.

Cite as 213 Neb. 741

IN RE INTEREST OF CARMELITA MADONNA BIRD HEAD, A MINOR CHILD.

STATE OF NEBRASKA, APPELLEE, V. ALVA BIRD HEAD RATTLING CHASE, APPELLANT.

331 N.W.2d 785

Filed March 18, 1983. No. 82-197.

1. **Indian Child Welfare Act: Words and Phrases.** Under the provisions of the Indian Child Welfare Act, 25 U.S.C.A. §§ 1901 et seq. (1983), "preadoptive placement" means the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement.
2. **Child Custody: Appeal and Error.** Factual support in the record in the trial court as to "good cause" for failure to comply with statutory child placement preference directives are necessary for appropriate appellate review.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed in part, and in part reversed and remanded with directions for further proceedings.

Susan I. Buckles and Joe Louie Romero of Western Nebraska Legal Services, for appellant.

Dennis D. King and Terrance O. Waite, and Michael T. Varn, guardian ad litem, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

MCCOWN, J.

This is a proceeding to declare an Indian infant a neglected and dependent child and to terminate parental rights. The county court of Sheridan County, acting in its capacity as a juvenile court, found Carmelita Madonna Bird Head to be a neglected and dependent child, terminated parental rights, placed custody of the child in the Nebraska Department of Public Welfare to be placed for adoption, and directed that temporary custody of the child should be continued in the foster parents previously designated by the Department of Public Welfare. Alva

Bird Head Rattling Chase, the child's maternal aunt, appealed to the District Court, which affirmed the judgment of the county court. The aunt has again appealed.

Carmelita Madonna Bird Head was born on September 3, 1979. Following the birth of the child her mother, Martha Bird Head, and the child resided with the mother's uncle, Thomas Plenty Wounds in Gordon, Nebraska. The residence periodically also served as a temporary residence for several other individuals, including Alva Bird Head Rattling Chase, a sister of Martha Bird Head. On many occasions, and for extensive periods of time before July 31, 1980, her mother had left the child in the care of Patricia and Delmer Dunnick of Rushville, Nebraska. Martha Bird Head died on July 31, 1980, in Denver, Colorado, shortly after being taken to the hospital.

Between July 31, 1980, and August 12, 1980, the child was in the care of her aunt, Alva Bird Head Rattling Chase, or Patricia and Delmer Dunnick. The child had been left at the residence of Thomas Plenty Wounds in Gordon, Nebraska, when her mother went to the hospital. On August 12, 1980, the child was taken into custody by the sheriff and a welfare worker. The sheriff delivered the child into the temporary custody of the Sheridan County Welfare Department, which placed her in the temporary care of Patricia and Delmer Dunnick.

On August 15, 1980, a petition was filed seeking to have the child declared to be neglected and dependent as described in Neb. Rev. Stat. § 43-202(1) (Reissue 1978), and seeking the termination of the parental rights of any natural father.

Two men listed by the mother on two different ADC applications as the father of the child were notified of the proceeding, neither of whom appeared. The former husband of Martha Bird Head, Fred Tail, was also notified. He appeared through counsel but later withdrew. Notice was also given to

the tribal prosecutor of the Oglala Sioux Tribe in Pine Ridge, South Dakota.

The appellant aunt, Alva Bird Head Rattling Chase, did not personally appear at the first hearing on September 3, 1980, but did appear by counsel. Following hearing, the court ordered that the Oglala Sioux Tribal Court be given notice of the proceeding, appointed a guardian ad litem for the minor child, continued temporary custody and care of the child in Patricia and Delmer Dunnick, and continued the proceeding.

On September 23, 1980, an adjudication hearing was held. The appellant was present and represented by counsel. Patricia and Delmer Dunnick were present and represented by counsel and the guardian ad litem for the child was also present. A motion requesting the court to transfer jurisdiction to the Oglala Sioux Tribal Court was made on behalf of Fred Tail by an individual who had no tribal authority to make such a motion.

The court noted that notice of the proceedings had been served on the tribal prosecutor of the Oglala Sioux Tribe and that the prosecutor had not appeared in the proceedings or authorized anyone else to appear on his behalf, and no appearance had been made on behalf of the tribe, the tribal juvenile court, the tribal prosecutor's office, or any other party who might be authorized to appear on behalf of the tribe, and that consideration of any such motion was premature.

The court then proceeded with the adjudication hearing and found that Carmelita Bird Head was a child described in § 43-202(1) and (2) and took under advisement the termination of parental rights. The court further found that the adjudication hearing did not preclude interested parties from addressing the issue of the court's jurisdiction pursuant to the Indian Child Welfare Act of 1978. The court therefore ordered the matter continued until October 31, 1980, for a hearing on motions which might be filed per-

taining to whether the matter should be transferred to the Oglala Sioux Tribal Court for further proceedings. The court directed that any such motions should be filed on or before October 16, 1980, and briefs in support or in opposition on or before October 26, 1980.

On October 18, 1980, a petition for transfer of the proceedings to the Oglala Sioux juvenile court was filed, signed by a judge of the tribal court. Objection was made on the ground of late filing. On October 30, 1980, the court accepted the filing and continued the hearing upon the petition to transfer proceedings to November 25, 1980.

On November 25, 1980, hearing on the petition to transfer jurisdiction to the tribal court was held as scheduled. No representative of the Oglala Sioux Tribe or of the tribal court was present to argue the motion or present evidence. The guardian ad litem and Patricia and Delmer Dunnick had filed objections to the petition.

Hearing was held and argument had. There was no evidence that the petition for transfer had been authorized by the tribe. The court apparently determined that the petition for transfer was unauthorized by the tribe or had been declined by the tribal court. The court found that the petition was deemed to have been abandoned and good cause had been shown by the evidence why the transfer should not be ordered. The court therefore denied the transfer and set the date for dispositional hearing. Neither the Oglala Sioux Tribe nor the tribal court appealed from the order, and neither has taken any further part in these proceedings.

A dispositional hearing was held on January 9, 1981. Evidence was submitted and the court found that the mother of the child was deceased and that the father of the child was unknown and had abandoned the child for more than 6 months, and that the child should be placed for adoption. The court therefore terminated the parental rights of any po-

tential father and ordered custody of the child placed with the Nebraska Department of Public Welfare to be placed for adoption by that agency, and continued temporary custody in Patricia and Delmer Dunnick pending further disposition by the Department of Public Welfare.

Alva Bird Head Rattling Chase appealed to the District Court. After extensive delays involving the right to proceed in forma pauperis and problems of preparation and completion of the bill of exceptions from the county court, the District Court received the bill of exceptions and some additional documentary evidence and took the case under advisement on February 2, 1982.

On February 16, 1982, the District Court found that the appellant's history of criminal conduct, her use of alcohol and resulting intoxication, and the apparent abuse of the child while in her care established that she was unfit to have custody. The District Court also found that the tribe and the tribal court had abandoned the motion to transfer jurisdiction and that the appellant was not an Indian custodian under the Indian Child Welfare Act. The District Court affirmed the judgment of the county court and this appeal followed.

The issues on this appeal revolve around the application of the Indian Child Welfare Act. 25 U.S.C.A. §§ 1901 et seq. (1983). The national policy undergirding the Indian Child Welfare Act is to protect the best interests of Indian children by the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture. See 25 U.S.C.A. § 1902.

The appellant first contends that she was an Indian custodian within the meaning of that act and that as such a custodian she is entitled to certain procedural and substantive rights similar to the rights of parents, including the right to petition to transfer to a tribal court.

25 U.S.C.A. § 1903 defines "Indian custodian" as

"any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child."

The evidence in the record here shows that before the sheriff took Carmelita into custody the child had spent a major part of her lifetime in the custody of the Dunnicks, who had been chosen to care for her by her mother. After the mother's death, and before the sheriff took custody, the child was in the possession of the appellant aunt for less than 1 week. The remainder of that time the child spent with the Dunnicks, with the approval of the appellant.

The appellant, at the dispositional hearing, admitted that she had a severe alcohol problem and that she had been convicted of more than ten misdemeanors and was on probation following her conviction for felonious entry of a building. There was also testimony as to bruises found on Carmelita's back when the child was taken from the appellant's possession by the sheriff.

No evidence was presented to indicate that the child's mother ever transferred temporary care or custody of the child to the appellant or intended for her to have custody of the child. The evidence indicates that the mother was taken from the residence to the hospital, suffering an overdose of drugs, and that she took no actions at all with reference to the care or custody of the child. The evidence fails to indicate that the mother ever transferred, attempted to transfer, or intended to transfer temporary physical care, custody, and control of the child to the appellant or anyone else at the time the mother was taken to the hospital.

The evidence in the record supports the findings of the District Court that the appellant was not an Indian custodian within the meaning of 25 U.S.C.A. § 1903, and that the appellant was unfit to have custody of the child.

The appellant next contends that the county court erred in failing to transfer the proceedings from the county court to the tribal court.

25 U.S.C.A. § 1911(b) provides: "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided,* That such transfer shall be subject to declination by the tribal court of such tribe."

In the present case the only petition for transfer of proceedings which is involved here was filed on October 18, 1980, by a juvenile judge of the Oglala Sioux Tribal Court. Hearing was set and objections to the filing and answers to the petition, alleging good cause for denial, were filed.

Neither the Oglala Sioux Tribe nor the tribal court nor any representative of either appeared at the time set for hearing, and there was no evidence that the petition had been authorized by the tribe or the proceedings accepted or approved by the tribal court. The trial court, after hearing, found that the proceedings had been abandoned and good cause for denial shown, and denied the transfer. The validity of the finding of abandonment is further established by the fact that neither the tribe nor the tribal court nor any representative of either appealed from the order, and neither has taken any further part in these proceedings.

There was ample evidence at the hearing to establish good cause for denial of the transfer. The minor child resided in Sheridan County, Nebraska, and not on the reservation. Virtually all the witnesses, including the appellant, also resided in Sheridan County, Nebraska. The reservation and the tribal court are located in South Dakota. Wit-

nesses also testified as to problems existing in the placement of Indian children on the reservation.

The record supports a determination that the petition was unauthorized and the transfer declined, and the finding that the proceedings had been abandoned and that good cause existed for denying the transfer.

Finally, the appellant contends that the court erred in failing to follow the preferential preadoptive placement provisions of the Indian Child Welfare Act, or to make any findings as to good cause for not doing so.

25 U.S.C.A. § 1903(1)(iii) provides that " 'preadoptive placement' . . . shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement."

25 U.S.C.A. § 1915(b) provides: "Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

"(i) a member of the Indian child's extended family;

"(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

"(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

"(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs."

In this case a second cousin of the child, Severt Young Bear, testified at the dispositional hearing and offered to take custody of the child. He was an extended family member under the provisions of 25

U.S.C.A. § 1903(2). Young Bear testified that there were other extended family members who would take the child but were unable to attend the hearing. There was also testimony by another witness that Young Bear's home could be certified as a foster home by the tribe within a week's time. There was also evidence that there were several Indian foster homes available which were licensed by the state or by the Bureau of Indian Affairs. There was also testimony by a witness that she maintained an Indian foster home in Sheridan County, Nebraska, which was licensed by both the State of Nebraska and by the Bureau of Indian Affairs.

The evidence therefore reflects that there were several possible placements which had a statutory preference over placement with the Department of Public Welfare or the Dunnicks. Although there was evidence that Patricia Dunnick was of partial Indian blood, the Dunnicks have no statutory claim of preference under 25 U.S.C.A. § 1915(b). The only evidence is that the Dunnicks are fit and proper persons to have custody of the child, but there is no finding by the county court to that effect, nor a finding as to their fitness compared to the fitness of the statutorily preferred individuals.

The Indian Child Welfare Act does not require a state court to make a child placement with a statutorily preferred person or agency. It requires only that a preference shall be given to such a person or agency in the absence of good cause to the contrary. While there may well be good cause for not complying with the statutory order of preference in the present case, the only direct finding which the court made as to any specific preferred person was the finding that the appellant was unfit to have custody of the child. The evidence supporting that finding constituted good cause as to the appellant, but the evidence is uncertain and no finding was made by either the county court or the District Court as to good cause for failing to comply with the statutory

order of preference as to the other statutorily preferred individuals or agencies.

The importance of the evidence and record as to good cause is illustrated by other portions of the preference statute. 25 U.S.C.A. § 1915(d) and (e) provides: "(d) The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

"(e) A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe."

The Indian Child Welfare Act does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus. The legislative history of the act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. Factual support in the record in the trial court as to "good cause" for failure to comply with statutory child placement preference directives are necessary for appropriate appellate review.

The record in this case is devoid of any findings by the county court as to what good cause was shown to warrant a failure to give statutorily specified preference to persons or agencies, other than the appellant, designated in 25 U.S.C.A. § 1915(b). The matter must, therefore, be remanded for further proceedings on that issue.

That portion of the order of the county court dated January 16, 1981, placing the minor child with the Nebraska Department of Public Welfare for adop-

tion is vacated and the cause is remanded for further proceedings with respect to preadoptive placement in accordance with this opinion. The termination of parental rights is affirmed. Temporary custody of the child is continued in Patricia and Delmer Dunnick pending a final order on disposition.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS FOR FURTHER PROCEEDINGS.

KRIVOSHA, C.J., concurring.

I concur in the result reached by the majority in this case. I believe, however, that we are in error in suggesting that the trial court was correct in finding that the petition to transfer was "abandoned." There is no way in which the tribal court may, under the specific provisions of the Indian Child Welfare Act, 25 U.S.C.A. § 1911(b) (1983), "abandon" the proceedings contemplated by the act. Under the provisions of the federal code, if either a parent of an Indian child or the Indian custodian or the Indian child's tribe petitions the state court to transfer the proceedings, the state court is obligated to transfer the proceedings unless either parent objects or good cause is shown why such transfer should not be made. Neither the parent nor the Indian custodian nor the Indian child's tribe has any further duties or obligations once the petition is filed. Absent an objection or proof why the transfer should not occur, the transfer is obligatory unless the tribal court declines the transfer. The act grants to the tribal court of such tribe the authority to decline the transfer but does not extend that right to anyone else authorized to file a petition. It is clear from reading the code that the entity authorized to decline the transfer, to wit, the tribal court, is not the same entity authorized to petition for the transfer. To therefore suggest that the tribal court abandoned the proceedings because one of the parties purporting to petition for the transfer failed to appear when no one is required to appear is to simply read something

into the act which does not exist. The tribal court has no obligation to do anything except receive the transfer unless it affirmatively takes action to decline. Its inaction, absent a requirement to perform any positive act, cannot and should not be deemed to be an abandonment.

WHITE and CAPORALE, JJ., join in this concurrence.

COLWELL, D.J., Retired, dissenting.

I respectfully dissent.

It would appear that the appellant in this case lacks standing to raise questions concerning the possible rights of others to the custody of Carmelita, a nonreservation Indian child under the Indian Child Welfare Act. It is noted that no other person has filed a notice of appeal.

I disagree with the majority opinion that assumes the constitutionality of the Indian Child Welfare Act and its directives to our courts on procedure and subject matter. The act is an attempt to invade a primary power and duty of the State of Nebraska to protect the rights and best interests of children reserved to it by article X of the Constitution of the United States.

Some of the objectionable parts of the act are:

Section 1912: "(d) Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."

Section 1915: "(a) In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

"(b) Any child accepted for foster care or preadoptive placement shall be placed in the least re-

strictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

"(i) a member of the Indian child's extended family;

"(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

"(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

"(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

"(c) In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. . . .

"(d) The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties."

At the time the law was under consideration by the Congress, the U.S. Department of Justice advised there were serious constitutional questions concerning the act. In a letter to the committee chairman it was stated: "A third and more serious constitutional question is, we think, raised by section 102 of the House draft. That section, taken together with sections 103 and 104, deals generally with the

handling of custody proceedings involving Indian children by State courts. Section 102 establishes a fairly detailed set of procedures and substantive standards which State courts would be required to follow in adjudicating the placement of an Indian child as defined by section 4(4) of the House draft.

"As we understand section 102, it would, for example, impose these detailed procedures on a New York State court sitting in Manhattan where that court was adjudicating the custody of an Indian child and even though the procedures otherwise applicable in this State court proceeding were constitutionally sufficient. While we think that Congress might impose such requirments [sic] on State courts exercising jurisdiction over reservation Indians pursuant to Public Law 83-280, we are not convinced that Congress' power to control the incidents of such litigation involving nonreservation Indian children and parents pursuant to the Indian commerce clause is sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising State jurisdiction over what is a traditionally State matter. It seems to us that the Federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power contemplated by section 102. See Hart, 'The Relations Between State and Federal Law,' 54 Colum. L. Rev. 489, 508 (1954)." 1978 U.S. Code Cong. & Ad. News 7561, 7562-63.

The Recommended Guidelines for State Courts-Indian Child Custody Proceedings, 44 Fed. Reg. 24,000 at 24,002 (1979), states in part: "For purposes of any such foster care, preadoptive, or adoptive placement, a determination of good cause to the contrary for such placement in accord with the preferences set out above should consider:

"(1) the requests of the biological parents, or the child when the child is of sufficient age."

It is of some significance in this case that the mother of the child, "on many occasions and for extensive periods of time," left the child in the care of the Dunnicks, the parties who have temporary custody of the child. The child has spent a major part of her lifetime in the care of the Dunnicks, who were chosen by the mother to care for the child.

I would affirm.

BOSLAUGH, J., joins in this dissent.

NEBRASKA TRUCK SERVICE AND SALES, INC., APPELLANT AND CROSS-APPELLEE, V. UNITED STATES FIRE INSURANCE COMPANY, A CORPORATION, APPELLEE; JOHNSTON INSURANCE AGENCY, INC., A CORPORATION, AND ROBERT LAMPE, APPELLEES AND CROSS-APPELLANTS.

331 N.W.2d 266

Filed March 18, 1983. No. 82-227.

1. **Insurance: Brokers: Damages.** The measure of damages for the loss caused by the negligence of the broker is the amount that would have been due under the policy if it had been obtained by the broker.
2. **Damages: Proof.** Damages, like any other element of plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove plaintiff's alleged damages.
3. _____: _____. It is fundamental that the plaintiff's burden to prove the nature and amount of damages cannot be sustained by evidence which is speculative and conjectural.
4. _____: _____. Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Richard J. Gilloon of Schicker & Leahy, for appellant.

Melvin C. Hansen and Richard J. Rensch of Hansen, Engles & Locjer, P.C., for appellee U.S. Fire Ins. Co.

John F. Thomas of McGrath, North, O'Malley & Kratz, P.C., for appellees Johnston Ins. and Lampe.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and BUCKLEY, D.J., and COLWELL, D.J., Retired.

KRIVOSHA, C.J.

The appellant, Nebraska Truck Service and Sales, Inc. (Nebraska Truck Service), appeals from an order entered by the District Court for Douglas County, Nebraska, sustaining a motion for judgment notwithstanding the verdict in favor of the appellees, United States Fire Insurance Company, Johnston Insurance Agency, and Robert Lampe, hereinafter jointly referred to as Insurers. We affirm.

Nebraska Truck Service filed suit against Insurers, alleging that Nebraska Truck Service, the owner of a 1978 Cobra fifth-wheel trailer, requested the Johnston Insurance Agency to obtain a garage and auto fleet insurance policy providing comprehensive coverage for the trailer. Nebraska Truck Service maintains that Johnston Insurance Agency negligently failed to obtain a comprehensive policy for the full value of the trailer and, instead, obtained coverage from U.S. Fire with a limit of $8,500. The trailer was stolen during the Labor Day weekend in September of 1979. U.S. Fire paid Nebraska Truck Service $8,500 for the loss of the trailer, pursuant to the policy.

In its order sustaining the motion for judgment notwithstanding the verdict, the trial court acknowledged that it should have sustained the motions for directed verdict made by Insurers at the close of the case. The rationale for the court's conclusion was that Nebraska Truck Service was contributorily negligent in not reading the policy when it was sent to it and that the policy, on its face, disclosed that the limit of liability was $8,500. The record is fairly clear that had the policy been examined it would have been apparent that the maximum amount of liability under the comprehensive section of the

policy was $8,500. We need not, however, reach that issue, because our examination of the record discloses that Insurers' motions for directed verdict, made both at the close of Nebraska Truck Service's case in chief and at the close of all the evidence, should have been sustained on the basis, as asserted by the Insurers, that Nebraska Truck Service had failed to prove the value of the trailer on the date of the loss. Under the terms of the policy issued, Nebraska Truck Service was required to do so and clearly did not.

As we noted in *Kenyon & Larsen v. Deyle,* 205 Neb. 209, 217, 286 N.W.2d 759, 764 (1980): "The measure of damages for the loss caused by the negligence of the broker is the amount that would have been due under the policy if it had been obtained by the broker." That amount is clearly provided for by the contract of insurance, and reads as follows: "B. The most we will pay for loss is the *smallest* of the following amounts: 1. The amount shown in the schedule of this endorsement. 2. The actual cash value of the damaged or stolen property at the time of loss. 3. The cost of repairing or replacing the damaged or stolen property with other of like kind or quality." (Emphasis supplied.) Nebraska Truck Service maintains that it should have been entitled to receive payment in an amount of not less than the difference between $18,347.94 and the $8,500 paid to it by U.S. Fire. In order to be entitled to that sum, or any sum in excess of the amount actually received, Nebraska Truck Service was obligated to introduce evidence showing that the actual cash value of the Cobra or the cost of replacing the Cobra on the date of loss was in excess of the amount which, in fact, it received from U.S. Fire. Damages, like any other element of plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove plaintiff's alleged damages. See *Settell's, Inc. v. Pitney Bowes, Inc.,* 209 Neb. 26, 305 N.W.2d 896 (1981).

The record in this case is simply silent as to those matters. The only evidence which remotely approaches value is testimony by an officer of Nebraska Truck Service as to the "approximate cost" of purchasing the trailer in question almost a year before the loss. Even then the testimony as to the purchase price is not precise. Nebraska Truck Service produced at trial two sales slips to reflect the purchase price of the trailer. One, offered and received in evidence, showed a price of $16,212. This admittedly was a duplicate prepared some time after the purchase. A second sales slip was not offered in evidence. William Smith, the president of Nebraska Truck Service, testified as follows: "Well, do you remember what the exact figure was, sir? A No, I don't." If all of the checks offered by Smith, allegedly representing the purchase price, are added together, the amount reached is $16,310.56. Smith testified that he also paid some cash, but he could not remember an exact amount. On redirect by its own counsel a Nebraska Truck Service officer was again asked about the purchase price, as follows: "Q . . . Mr. Smith, is that $16,212.00 an accurate figure for what you paid for the 1978 Cobra fifth-wheel trailer when you purchased it in Logan, Iowa? A No." Smith again attempted to testify as to some approximate figure, but the answer was stricken by the court.

Assuming, for the sake of argument, that one can determine from all of the evidence a specific dollar amount representing the purchase price of the trailer, the most that one can determine is the purchase price of the trailer nearly a year earlier than the loss; and while the purchase price might, under proper conditions, reflect present value, the evidence in this case is simply insufficient. There is no testimony as to the condition of the trailer after its purchase, nor any testimony from which it can be concluded that the value of the trailer when it was stolen was equal to or greater than the purchase

price nearly a year earlier. It was Nebraska Truck Service's burden to present that evidence, and its failure to do so was fatal. "It is fundamental that the plaintiff's burden to prove the nature and amount of damages cannot be sustained by evidence which is speculative and conjectural." *Dawson v. Papio Nat. Resources Dist.*, 206 Neb. 225, 232, 292 N.W.2d 42, 47 (1980). See, also, *Clearwater Corp. v. City of Lincoln,* 202 Neb. 796, 277 N.W.2d 236 (1979). "Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation." *Hatch v. Heim,* 200 Neb. 735, 738, 265 N.W.2d 444, 445-46 (1978).

In the instant case Nebraska Truck Service was alerted to the problem when Insurers moved for a directed verdict, both at the close of the plaintiff's case and again at the close of all the evidence, on the specific ground that Nebraska Truck Service had failed to prove the value of the trailer on the date of its loss. It was not too much to ask Nebraska Truck Service to offer testimony as to the value on the date of the loss, as required by the policy. Having failed to do so, there was no evidence upon which the jury could determine the proper measure of damages, and the trial court therefore should have sustained the motion to dismiss. Recognizing its error and having entered a judgment notwithstanding the verdict, the court corrected the defect which earlier had gone uncorrected. The fact that it may have given a reason other or different than the one upon which we base our decision is of no moment in the present case. The judgment of the trial court is affirmed.

AFFIRMED.

GENERAL MOTORS ACCEPTANCE CORPORATION, APPELLEE, V. DON FRITZ, APPELLANT, AND NADINE FRITZ, APPELLEE.

331 N.W.2d 269

Filed March 18, 1983. No. 82-232.

Contempt. In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of the purposes for which the order was entered.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Reversed and remanded with directions.

William W. Griffin, for appellant.

Cronin, Hannon & Symonds, and Otis M. Smith and John F. Farmer, for appellee General Motors.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and BUCKLEY, D.J., and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal from an order of the District Court for Holt County, Nebraska, holding the appellant, Don Fritz, in contempt for failure to obey a court order of November 9, 1981.

The principal case arose in the District Court by the filing of a petition in replevin by appellee, General Motors Acceptance Corporation. The petition alleged a security instrument in a certain motor vehicle, a promissory note, and default by Don Fritz and Nadine Fritz, and requested delivery of the motor vehicle.

After reciting the facts above described, the court entered the following order: "The Court being fully advised in the premises finds that the Court should and hereby does issue a temporary order addressed to the defendants ordering and directing the defendants to hold the above described property in his possession, unimpaired and unencumbered, and in all respects in the same state and condition as it is at

the time of the receipt of this order, until further order of the Court."

After hearing, the court, on November 20, 1981, found that the appellee was entitled to possession and directed the clerk to issue an order in replevin. On January 12, 1982, the order was returned unsatisfied, with the return of the sheriff stating that the Fritzes were not found in Holt County. No mention is made in the return of the sheriff as to his fortune in locating the automobile. However, we assume for the purposes of this opinion that the automobile was not found in Holt County either.

In any event, the next move in the appellee's attempt to secure possession was the filing of a verified "Motion for Citation" on December 4, 1981, prior to the return of the order of replevin, which alleged in part: "That notwithstanding the premises, the defendants have disregarded the order of this Court dated November 9, 1981, as follows, to-wit: that they have failed to hold said 1981 Oldsmobile in their possession in *Holt County,* Nebraska." (Emphasis supplied.)

At a hearing held on February 2, 1982, testimony was offered that the sheriff and/or deputies of Holt County had been at appellant's home on a number of occasions and did not locate the automobile, and on one occasion at appellant's place of employment. Appellant maintained that the vehicle was in his possession, unencumbered and unimpaired. However, when asked the location of the motor vehicle, the appellant refused to answer, claiming that since a criminal charge was then pending of concealing mortgaged property, the answer would tend to incriminate him. The court did not compel the appellant to answer. Although no formal order so holding is found in the transcript, the bill of exceptions reveals that at the conclusion of the hearing the trial court held the appellant in contempt. "[T]he Court finds the defendant to be in contempt of Court for having failed to hold said described property in his

possession, unimpaired and unencumbered, as directed in the order of November 9, 1981 . . . ."

We reverse. It is not necessary to here discuss the appropriate procedures in contempt cases, nor the fine distinction between civil and criminal contempt. It is sufficient to point out that the appellant was cited for contempt for failure to hold the automobile in his possession in Holt County, a duty that the order of November 9, 1981, did not impose on him. There was no proof that the appellant was not in possession of the automobile in Holt County or elsewhere; simply that the sheriff could not find it in Holt County. Neither the order of November 9, 1981, nor the order for a writ of replevin commanded the appellant to produce the automobile. While the Fritzes have unquestionably frustrated the appellee's right to possession, their refusal to produce the car is not contempt, absent an order directing them to produce it.

The most that can be said is that appellee offered evidence that the automobile was not located in Holt County. Since the order did not require the automobile to be kept in Holt County, it follows that the appellant cannot be held in contempt for that reason.

"In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of the purposes for which the order was entered." *Malec v. Malec,* 196 Neb. 533, 537, 244 N.W.2d 82, 85 (1976).

Reversed with directions to dismiss the contempt citation.

REVERSED AND REMANDED WITH DIRECTIONS.

Cite as 213 Neb. 763

FARMERS COOPERATIVE ASSOCIATION, ST. EDWARD, NEBRASKA, APPELLEE, V. BOONE COUNTY BOARD OF EQUALIZATION, APPELLANT.

CEDAR VALLEY COOPERATIVE, APPELLEE, V. BOONE COUNTY BOARD OF EQUALIZATION, APPELLANT.

FARMERS CO-OP EXCHANGE OF ELGIN, APPELLEE, V. BOONE COUNTY BOARD OF EQUALIZATION, APPELLANT.

332 N.W.2d 32

Filed March 25, 1983. Nos. 44440, 44441, 44442.

1. **Taxation.** Under the provisions of Neb. Rev. Stat. § 77-1502 (Reissue 1981) the county board of equalization may meet at any time for the purpose of equalizing assessments of any omitted or undervalued property and is not limited in its actions to property which the assessor has adjusted prior to April 1 of the year in question.
2. _____. An owner is not deprived of his property without due process of law by means of taxation, if he has an opportunity to question its validity or the amount of such tax or assessment at some stage of the proceedings, either before that amount is finally determined or in subsequent proceedings for its collection.
3. **Taxation: Presumptions.** In the absence of other evidence, proof that the guidelines provided by the Tax Commissioner were applied raises a presumption that the assessment is legally proper. Where, however, evidence which establishes that following the guidelines will violate either the constitutional provisions requiring that property be taxed uniformly and proportionately or the statutory requirement that property be taxed at its actual value is introduced by either party, the guidelines must give way to the evidence.
4. **Taxation: Valuation.** Authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value, and the ultimate question is whether the method used ultimately attains a reasonable degree of uniformity in value. Approximation of value and uniformity of taxation is all that can be accomplished, and substantial compliance with the requirement of equalization and uniformity of taxation laid down by the Constitution is all that is required.
5. **Taxation: Valuation: Appeal and Error.** In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.

Appeal from the District Court for Boone County: JOHN C. WHITEHEAD, Judge. Reversed and remanded with directions.

Bernard L. McNary, Boone County Attorney, for appellant.

Larry D. Bird of Treadway & Bird, P.C., for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

KRIVOSHA, C.J.

This appeal involves three tax cases which were consolidated for trial in the District Court for Boone County, Nebraska, and for appeal in this court. The appellees, Farmers Cooperative Association, St. Edward, Nebraska (St. Edward), Farmers Co-op Exchange of Elgin (Elgin), and Cedar Valley Cooperative (Cedar Valley), are cooperatives which own and operate grain elevators and concomitant facilities in Boone County. The facilities at St. Edward and Elgin are located upon land owned by the cooperatives, while the Cedar Valley facilities at Primrose and Cedar Rapids are located upon land leased by the cooperative from a railroad. They appealed from orders of the county board of equalization of Boone County which increased actual values of their properties for the year 1980 over the valuations which had been set for the preceding year. The increases made by the board were founded upon two factors. In some cases the increase was occasioned by the removal or reduction of a factor previously allowed by the county and referred to in the record as "economic obsolescence." In some cases the increase was occasioned by the addition of improvements on the property which had been apparently omitted and unreported in earlier years. The cooperatives appealed to the District Court from the valuations set by the county board of equalization. Upon trial de novo in the District Court, the court

set aside the increases in valuation of both the St. Edward property and the Elgin property because it found the action of the board was void for want of proper notice under the provisions of Neb. Rev. Stat. § 77-1315 (Reissue 1981) and for want of a proper hearing under the provisions of Neb. Rev. Stat. § 77-1502 (Reissue 1981), and set the valuations at those of the previous year, that is, 1979. As to the property of Cedar Valley, it made a finding that the decision of the board and the order of the board increasing Cedar Valley's valuations should be reversed. The trial court found that the property of Cedar Valley should have been allowed the same economic obsolescence as other commercial property in the village of Primrose and the village of Cedar Rapids, which was 50 percent, and entered an order in conformity with its findings. However, the trial court allowed the addition of omitted property by the board and remanded the Cedar Valley case back to the board so as to permit the board to compute the appropriate economic obsolescence. For reasons set out herein, we reverse the decision of the trial court.

The record discloses that St. Edward has two parcels of land at issue here. Their combined actual valuation was increased from $46,050 for 1979 to $90,690 for 1980, nearly all of which, except for a 4 percent mandatory increase ordered by the State Board of Equalization and Assessment, was by reason of the board removing a 50-percent economic obsolescence factor previously given the property. The board also removed a bin which had previously been taxed and which apparently no longer existed.

The valuation of the Elgin facility at Petersburg was increased from $72,925 to $119,330, including the 4-percent increase ordered by the state board. The increase was mostly the consequence of reducing the economic obsolescence factor from 50 to 25 percent. The 25 percent was allowed because the elevator did not have access to rail facilities. Twenty-

five-percent economic obsolescence was also allowed on the omitted improvements. The actual valuation of Cedar Valley's Primrose facility was increased from $143,605 to $216,605 by the addition of omitted improvements, plus the state board's mandatory 4-percent increase. No economic obsolescence had previously been allowed on this property and none was allowed on the omitted improvements. The Cedar Rapids facility's valuation was increased from an actual value of $43,255 to $235,276, including the state board's 4-percent mandatory increase. This increase consisted of adding improvements not previously listed. Economic obsolescence was not granted to these values because none had previously been allowed. The issues raised in the District Court and in this court involve three in number. Two of the issues concern the procedure followed in making the changes in valuation. The third issue has reference to the proper allocation of economic obsolescence to the elevators.

The record made in the District Court establishes that early in the year 1980 the county assessor of Boone County and the county board of equalization determined that elevators in the county should be reexamined to determine if those elevators, including the ones owned by St. Edward and Elgin, should continue to receive depreciation for economic obsolescence. As already noted, not all elevators in the county, including the two owned by Cedar Valley, were previously given depreciation for economic obsolescence. The board asked for assistance from the office of the state Tax Commissioner. That office furnished an appraiser who inspected the properties. The state appraiser determined that the elevators were in fact fully functional and, except for Elgin, should not receive any depreciation for economic obsolescence. On April 18, 1980, notice of the increased assessments was given to the owners. Each notice stated the amount of change and the

reason for the change. For St. Edward and Elgin, the notice explained that the adjustment was due to the change in the depreciation factor for economic obsolescence, and for Cedar Valley it listed the addition of omitted property. The property owners were also advised of a hearing to be held on May 5, 1980, for the purpose of equalizing the omitted or undervalued property.

The cooperatives, either through their managers or their attorney, appeared at the May 5 hearing and objected to the increases because of the failure of the board to make the adjustments prior to April 1, 1980, as allegedly required by the provisions of § 77-1315. Neither the cooperatives nor the assessor presented any evidence at this hearing, and the hearing was recessed by the board.

On June 3, 1980, the board met again and the appraiser from the state met with them. The board questioned the appraiser and the county assessor, but no further evidence was presented and the board adhered to the changed valuations stated in the earlier notices sent to the cooperatives. The cooperatives did not receive notice of the June 3, 1980, meeting and did not appear.

Before proceeding to address the errors assigned by the county board, we deem it appropriate to note what is not involved in this case. This case is not one involving the question of whether the properties in question were assessed in excess of their actual value. No evidence was introduced by any of the parties regarding actual value. Rather, this is a case questioning whether the properties of the various elevators have been assessed uniformly and proportionately as required by the provisions of Neb. Const. art. VIII, § 1. The resolution of that question depends upon whether the county board was required to give to each of the elevators depreciation for economic obsolescence as referred to in a manual prepared by the Tax Commissioner. Before addressing that question, however, we turn first to

the procedural questions previously raised by the property owners and determined by the trial court.

St. Edward and Elgin maintained that the county board was without jurisdiction to act in this case because notice of the board's action in increasing the values of the various properties was not sent to property owners prior to April 1 of the taxing year, as required by the provisions of § 77-1315. We believe, however, that the property owners are in error with regard to this contention. It is true that § 77-1315 does require the *county assessor,* or the county clerk where he is ex officio county assessor, to complete his revision of the assessment rolls, schedules, lists, and returns and to file them with the county clerk on or before April 1 of each year and to give notice of increased assessments to the owners before such filing. In this case, however, the adjustments were not made by action of the county assessor, and the provisions of § 77-1315 have no application as to notice. Rather, this is a case involving the board's direct authority over either the addition of omitted property or the increasing of undervalued property. The provisions of § 77-1502 apply, not § 77-1315.

Section 77-1502 first provides for a procedure whereby the county board, between April 1 and May 30, must hold a session of not less than 3 nor more than 60 days for the purpose of reviewing and deciding protests filed pursuant to §§ 77-1502 to 77-1507. It is clear from a reading of the statutes that this procedure arises as a result of protests filed by taxpayers in response to action taken by the county assessor prior to April 1, pursuant to § 77-1315. Section 77-1502, however, does not end at that point. It goes on to provide that in addition to the protest review meeting, "The board may meet at *any time* upon the call of the chairman or any three members of the board for the purpose of equalizing assessments of any omitted or undervalued property." (Emphasis supplied.)

In *Ewert Implement Co. v. Board of Equalization,* 160 Neb. 445, 70 N.W.2d 397 (1955), we examined that very clause and pointed out that the authority of the board to meet at any time was the result of an amendment adopted in 1947 by the Nebraska Legislature. In *Ewert* at 447-48, 70 N.W.2d at 399-400, we said: "It appears to us that the authorities cited by the plaintiff still apply to matters contemplated by the first sentence of section 77-1502, R.S. Supp., 1953. But as to the second sentence, the power of the county board of equalization to deal with omitted and undervalued property is greatly extended from what it was prior to 1947. The county board of equalization is authorized in terms by the second sentence of section 77-1502, R.S. Supp., 1953, to equalize assessments of omitted or undervalued property. It is clear therefore that the second sentence of section 77-1502, R.S. Supp., 1953, was intended as an extension of the power of the county board of equalization. The use of the words 'at any time' therein certainly means that the assessment of omitted or undervalued property may be dealt with after the expiration of the 40 days and after July 1, the date the county assessor is required to forward a certified copy of the abstract of the assessment rolls to the Tax Commissioner." We find nothing, either in the applicable statutes or in any of our subsequent decisions, to persuade us that the reasoning of the *Ewert* decision is not correct. Obviously, when the Legislature authorized the board to meet "at any time," it meant at any time and did not intend to require the board to act prior to April 1, thereby depriving the board of a great deal of the authority just given. We hold that under the provisions of § 77-1502 the county board of equalization may meet at any time for the purpose of equalizing assessments of any omitted or undervalued property and is not limited in its actions to property which the assessor has adjusted prior to April 1 of the year in question. Therefore, the fact that the adjustments to valuation

were made after April 1 or that St. Edward and Elgin did not receive notice under the provisions of § 77-1315 was of no significance in that such action and the notice thereof could occur at any time during the year. The trial court was in error in holding to the contrary.

We now turn to the second contention of the county board that the court erred in finding that the board did not give the appellees a proper hearing under § 77-1502. A reading of § 77-1502 does not disclose any requirement for a hearing. The board is authorized to add omitted property or adjust undervalued property on its own motion and without any prior hearing. The only hearing required to be given by the board is in connection with protests filed by taxpayers as a result of action taken by the county assessor. While this may appear to be an anomaly, it is the language of the statute and we are not at liberty to amend the statute. The issue, therefore, is not whether the county board failed to grant a hearing under the provisions of § 77-1502 before adjusting the values in question, but whether the action of the board in increasing the value of the appellees' property, either by adding omitted property or refusing to grant economic obsolescence, without further notice or a subsequent hearing before the board, denied to the appellees due process of law. We think not. The statutes of the State of Nebraska make it clear that one who is dissatisfied with the actions of the board may appeal to the District Court within 45 days after adjournment of the board. See Neb. Rev. Stat. § 77-1510 (Reissue 1981). The District Court is to hear such appeals as in equity and without a jury and is to determine anew all questions raised before the board which relate to the liability of the property to assessment, or the amount thereof. See, Neb. Rev. Stat. § 77-1511 (Reissue 1981); *Hastings Building Co. v. Board of Equalization,* 190 Neb. 63, 206 N.W.2d 338 (1973). That is to say, by reason of the provisions of the

Nebraska statute, appeals to the District Court are de novo and the property owner is afforded the opportunity in the District Court to introduce any and all relevant evidence for the purpose of establishing that the action of the county board was in error. In effect, the action of the county board is not final and binding, if appealed, until the District Court acts after affording the property owner a full due process hearing.

In *Frye v. Haas,* 182 Neb. 73, 152 N.W.2d 121 (1967), we were given the opportunity to review this very issue. In upholding a statute which allowed educational service units to levy a tax without it being certified by the county board, we said at 76-77, 152 N.W.2d at 124-25: "The rule is stated in Nickey v. State of Mississippi, 292 U.S. 393, 54 S. Ct. 743, 78 L. Ed. 1323, as follows: 'There is no constitutional command that notice of the assessment of a tax, and opportunity to contest it, must be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal before exaction of the tax and before the command of the state to pay it becomes final and irrevocable. [Citations omitted.]'

"The application of this rule is well stated in 16A C.J.S., Constitutional Law, § 650(a) (2), p. 977, as follows: 'Due process is afforded if the taxpayer has an opportunity to question the validity or the amount of an assessment before the amount is determined, or at any subsequent proceedings to enforce its collection, or subsequent to collection in a suit for refund of taxes paid under protest, or at any time before liability for the tax becomes finally and irrevocably fixed.' "

In *County of Douglas v. State Board of Equalization & Assessment,* 158 Neb. 325, 335, 63 N.W.2d 449, 457 (1954), we said: " 'An owner is not deprived of his property without due process of law by means of taxation, if he has an opportunity to question its validity or the amount of such tax or assessment at

some stage of the proceedings, either before that amount is finally determined, or in subsequent proceedings for its collection.' " See, also, *State ex rel. Douglas v. State Board of Equalization and Assm't,* 205 Neb. 130, 286 N.W.2d 729 (1979). While it ought to be apparent that giving notice to property owners by the county board before increasing the values should reduce unnecessary appeals and may oftentimes resolve disputes, absent a requirement by the Legislature that such hearing be held, and in light of the de novo hearing before the District Court, failure by the county board to afford the property owner a hearing does not deny to a property owner due process of law. To accept the appellees' position would be to expand the Administrative Procedures Act to cover county government. This the Legislature has refused to do. Neb. Rev. Stat. § 84-901(1) (Reissue 1981). See *County of Gage v. State Board of Equalization & Assessment,* 185 Neb. 749, 178 N.W.2d 759 (1970).

We believe that the trial court's finding that the board did not give the property owners a proper hearing under the provisions of § 77-1502 or, more importantly, denied to them due process of law was in error and must be reversed.

That leaves us, then, with the final question, whether the board acted arbitrarily with regard to the matter of economic obsolescence. In essence, the property owners maintain that the county board was *required* to grant economic obsolescence to the grain elevators by reason of guidelines previously promulgated by the Department of Revenue. Unfortunately for us, all of the regulations have not been introduced in evidence and are not before us. All that we have are selected sheets which do not tell us precisely how or in what manner the guidelines are to be administered. What we do have, however, does not support the contention that economic obsolescence was required to be given to the owners of the grain elevators simply by reason of the fact

that some commercial properties in the areas in which the elevators were located were also granted economic obsolescence. Page 157 of the Nebraska Cost Construction Manual reads in part as follows: "Unlike physical and functional factors, loss in value due to economic factors *usually* effects [sic] an entire neighborhood rather than individual properties." We have no disagreement with this language. We do not believe, however, that this language in any way compels the granting of economic obsolescence to every piece of property in an area which otherwise has been determined to suffer from economic obsolescence.

The guidelines further define economic obsolescence as "caused by factors outside the property," *Id.* at 182, as "the loss in value due to the effect of functional or economic factors. A condition of being out of date," *Id.* at 181, and as "influences of the district upon the property," *Id.* at 183. The evidence in this case supports the board's conclusion that while other businesses in the area may have suffered from economic obsolescence, the grain elevators have not. The grain elevators continue to perform their designated function, even though the surrounding areas have deteriorated. Farmers continue to bring their grain to the elevators without regard to what the rest of the community may look like and the elevators continue to receive rent for storage of government grain at the same rate. The evidence establishes that the elevators have not had any significant reduction in business.

The final provision urged upon us by the property owners as evidence of their right to economic obsolescence is found in the manual at page 185 and reads as follows: "Economic obsolescence is rarely curable. It attaches to a neighborhood and displays itself in conditions that surround a structure rather than in the actual buildings or property itself. The loss in value rate, when determined, applies to all structures in the area and is identified on the prop-

erty record card as an area allowance." It is apparent that the type of economic obsolescence referred to in this passage of the guidelines is due to the fact that an entire area becomes victim to economic obsolescence. However, where the particular buildings in question are one-purpose buildings, such as grain elevators, and are dependent not so much upon location but, rather, upon the function they may perform, then it is apparent that, absent other evidence, the withholding of economic obsolescence from a grain elevator located on a rail line cannot be said to be arbitrary or improper. This is further supported by a passage at page 182 of the manual which cautions the appraisers to "make a thorough investigation of the economic background of *each individual property* in order to determine the degree of functional or economic obsolescence which exists." (Emphasis supplied.)

In essence, the property owners argue that the guidelines are law and *must* control both classification and value, regardless of the evidence. We think not. In the absence of other evidence, proof that the guidelines provided by the Tax Commissioner were applied raises a presumption that the assessment is legally proper. Where, however, evidence which establishes that following the guidelines will violate either the constitutional provisions requiring that property be taxed uniformly and proportionately or the statutory requirement that property be taxed at its actual value is introduced by either party, the guidelines must give way to the evidence.

The decision of the county board in removing or reducing economic obsolescence on the St. Edward and Elgin properties in question and withholding it from the two Cedar Valley properties is amply supported by the evidence in the record. The chief appraiser for the state testified that he personally examined and appraised each of the grain elevators and determined that economic obsolescence was not appropriate because, based on government storage

rates, the elevators did not measure a loss in economic rent. He said that economic rent is a more standard measure than is market sales. Appellees disputed this claim and contended that market sale methods should have been used. However, in *Riha Farms, Inc. v. County of Sarpy,* 212 Neb. 385, 389, 322 N.W.2d 797, 800 (1982), we said: "Authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value, and the ultimate question is whether the method used ultimately attains a reasonable degree of uniformity in value. Approximation of value and uniformity of taxation is all that can be accomplished, and substantial compliance with the requirement of equalization and uniformity of taxation laid down by the Constitution is all that is required."

And in *Bumgarner v. County of Valley,* 208 Neb. 361, 366, 303 N.W.2d 307, 310 (1981), we said: "In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment."

It cannot be said in this case that the guidelines promulgated by the Department of Revenue require the imposition of a depreciation factor which, if granted, would clearly undervalue the property in question. By its action, the county board in fact appears to have fulfilled its constitutional obligation of assessing grain elevators uniformly and proportionately throughout the county. The appellees have failed to prove that this treatment of grain elevators as a separate class violates the uniformity principles

as against all other property in the county. Therefore, the judgment of the trial court must be reversed and the cause remanded with instructions to enter a judgment reinstating the valuations as established by the county board of equalization.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., not participating.

KERREY CONSTRUCTION COMPANY, APPELLEE, V. WILMER A. HUNT ET AL., APPELLANTS.

331 N.W.2d 519

Filed March 25, 1983. No. 81-732.

1. **Contracts: Damages.** The general measure of damages for a breach of contract to convey land is the market value at the time of breach less the contract price.
2. _____: _____. Where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Randal B. Brown, for appellants.

Rollin R. Bailey of Bailey, Polsky, Cada & Todd, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

WHITE, J.

This is an action brought by Kerrey Construction Company, a Nebraska corporation, plaintiff-appellee, against Wilmer A. and Marcella R. Hunt, husband and wife, defendants-appellants, to recover damages for the breach of a written real estate purchase agreement executed on March 9, 1978, and later modified on March 9 and 11, 1978. At the conclusion of the trial the jury returned a verdict of

$35,000 for Kerrey Construction Company. The Hunts appeal, raising several assignments of error. We affirm.

The Hunts are the owners of a tract of land of approximately 12½ acres, located at Lot 11 of Irregular Tracts in the southeast quarter of the southwest quarter of Section 11, Township 9 North, Range 6 East of the 6th P.M., Lincoln, Lancaster County, Nebraska. Mr. Hunt is a deputy city engineer for the city of Lincoln, Nebraska.

Kerrey Construction Company is a family corporation, with James H. Kerrey and his son John Kerrey as the principal officers. John Kerrey is also a licensed real estate broker, and at the time the contract was signed he was an employee of Re/Max realty company, a member of the Multiple Listing Service.

The Hunts (sellers) listed their land for sale with Austin Realty Co., a member of the Multiple Listing Service.

On February 10, 1978, John Kerrey, acting on behalf of Kerrey Construction Company (buyer), submitted a written real estate purchase offer for sellers' property to Ronald Tonniges, sellers' agent at Austin Realty Co. Under the multiple listing arrangement, Austin Realty was to act as the listing agent and Re/Max was to act as the selling agent. Both agents were to share in commission from the sale.

Tonniges presented the offer to the sellers, and they rejected it on February 11, 1978. Three other written offers were subsequently submitted to the sellers by buyer, and all were rejected. After the last offer was turned down buyer proposed that Tonniges might be able to get together with sellers and prepare a contract that would be satisfactory.

Tonniges, working with the sellers, prepared a contract on March 9, 1978, on the same "Offer to Purchase" multiple listing form that had been used

in all the previous offers from buyer. The signed proposal contained a typed provision which stated, "This counter-offer is to be null and void if not signed by the buyer and returned to Austin Realty before Saturday March 11, 1978 at 5:00 P.M." Re/Max was listed as the selling agent, with a total price of $105,000 for the land and $5,000 of the total to be paid down by check. Closing was to take place on June 1, 1978.

On March 11, 1978, the sellers' proposal was delivered to John Kerrey who, on behalf of buyer, executed a $5,000 check for the downpayment. Then, on behalf of Re/Max, John Kerrey signed a receipt for the $5,000 check and placed it in a desk drawer at the Re/Max office.

Buyer crossed out sellers' request in the form for a specific name to be given to a street in the new development, and also added that buyer's officers were licensed real estate salesmen. Buyer signed and returned the proposal to Tonniges before the deadline. Sellers approved the changes, and on March 15, 1978, returned the contract, with the acceptance receipt signed on the back. Buyer also signed at the place designated on the contract which specified that it had received it, and proceeded to deliver the $5,000 check to Re/Max, with the completed contract.

After the modified contract had been signed buyer contacted Bill Kennedy, a coworker at Re/Max, to see if he might know of anyone interested in developing the land. Kennedy contacted James Christo of Christo Construction Company, and a purchase agreement was signed on March 21, 1978, between John Kerrey and Christo on behalf of their respective companies. Christo agreed to pay $4,000, plus 1/60th of the amenities for each of 60 townhouse sites, or a total of $240,000 for the same land buyer was purchasing from sellers for $105,000.

The buyer had retained the services of an engi-

neering and architectural firm to prepare estimates and the layouts of the proposed construction site.

Shortly before closing was to take place, the buyer's attorney examined the abstract of the property furnished by the sellers and determined that the property was unmarketable since the actual metes and bounds of the tract were not described. The title problem was relayed to Tonniges, who informed sellers that the sale could not be closed on June 1 unless the title problem was remedied.

On June 5, 1978, sellers wrote a letter to the buyer and Austin Realty, stating that the contract had been terminated: "Your violation consisted of failing to close on the purchase of the contract on June 1, 1978, advising my realtors that you did not have the money to close."

Upon receipt of the letter buyer's attorney informed sellers that, in his opinion, title was not marketable but that his client was still interested in completing the contract once title was cleared. Additional correspondence occurred during the summer, with no further development between the parties.

On August 13, 1978, buyer wrote sellers a check for $99,828.51 and signed a closing statement, both of which were delivered to Austin Realty, the listing agent. On August 14, 1978, the attorney for buyer wrote a letter to the sellers reaffirming that buyer was ready to perform and was waiving all title defects. The letter also stated that buyer had sold the land to a third party for $240,000 and that if sellers refused to close the transaction by noon on August 16, 1978, an action for damages would be instituted against them.

Sellers refused to close on the new date specified by buyer's attorney. On August 30, 1978, Christo Construction Company wrote a letter to buyer canceling its agreement to purchase the property because buyer was not able to obtain the land.

Buyer filed suit and trial was had. At the conclu-

sion of the trial the court instructed the jury, and the jury returned a verdict of $35,000 for Kerrey Construction Company.

The Hunts raised several defenses at trial: (1) That Kerrey Construction did not accept their counteroffer by March 11, 1978, and therefore the offer was null and void; (2) that there was no consideration because of the failure of Kerrey Construction to have its check certified; and (3) that John Kerrey violated his fiduciary duty to the Hunts because he induced them to accept $105,000 for the land when he knew it was worth more. These factual issues were disputed at trial, properly submitted on instructions, and the jury found against the Hunts on each defense by finding that a breach had occurred. Although not specifically assigned as error, the Hunts appear to be attempting to reargue the factual findings of the jury, in addition to the assignments of error set forth in their brief. There was sufficient evidence presented, and therefore we do not quarrel with the decision of the jury in this case finding that a breach had occurred and its resolution of the other factual issues presented.

This opinion will therefore discuss only whether the trial court erred in submitting the loss of Kerrey Construction Company's resale contract to the jury as an element of damages in this case. We find the Hunts' other assignments of error relating to the trial court's failure to give proposed instructions and failure to grant a motion for judgment notwithstanding the verdict to be unmeritorious.

The general measure of damages for a breach of contract to convey land is the market value at the time of breach less the contract price. *Hahn v. International Management Services, Inc.*, 207 Neb. 229, 298 N.W.2d 140 (1980); *Oman v. City of Wayne*, 152 Neb. 341, 40 N.W.2d 916 (1950). The exception to this rule is that where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably

be supposed to have been in the contemplation of the parties at the time the contract was made. *Violet v. Rose,* 39 Neb. 660, 58 N.W. 216 (1894); *Hadley v. Baxendale,* 9 Ex. 341, 156 Eng. Rep. 145 (1854); Restatement (Second) of Contracts § 351 (1981).

Kerrey Construction maintained throughout trial that it was entitled to receive lost profits because of its inability to complete the arrangements it had made for the resale of the land at a profit. Evidence at trial showed that after the contract was signed between Kerrey Construction and the Hunts, Kerrey Construction had arranged to sell the land to Christo Construction Company for a considerable profit. The sole reason that these arrangements fell through appears to have been the inability to procure title from the Hunts.

The trial court proceeded to give instructions upon the measure of damages, couched in the specific terms of the loss of the resale bargain, and the issue of general damages was not presented to the jury.

We are unable to say upon the facts of this case that, as a matter of law, the damages caused by the loss of the resale contract were not within the contemplation of the parties at the time they entered into the contract. There was evidence presented that the Hunts knew they were conveying to a construction company whose principal officers were real estate agents. Mr. Hunt was the city engineer of Lincoln, was very familiar with land development, and even provided Kerrey Construction with several maps as to how the tract could be developed.

While it may or may not have been reasonable to assume that the Hunts thought Kerrey Construction would develop and build on the land, selling it parcel by parcel rather than contracting to sell the entire tract to a third party, the issue was properly submitted to the jury and a verdict was returned against the Hunts. Applying the rule in *Hadley v. Baxendale, supra,* we believe that the loss of a prospective sale of land can be considered as arising

naturally from the breach of contract in this case and that a prospective sale can reasonably be supposed to have been in the contemplation of both parties at the time they made the contract. Any language in *Violet v. Rose, supra,* inconsistent with this opinion is hereby overruled.

Therefore, we find that the trial court was correct in admitting evidence regarding the resale contract with Christo Construction Company and submitting the issue of special damages to the jury.

AFFIRMED.

CLINTON, J., not participating.

NATIONAL CRANE CORPORATION, A CORPORATION, APPELLANT, V. OHIO STEEL TUBE COMPANY, A CORPORATION, APPELLEE.

332 N.W.2d 39

Filed March 25, 1983. No. 81-747.

1. **Torts: Strict Liability: Damages.** The doctrine of strict liability in tort may be used to recover damages to the defective product itself where the damage occurred as a result of a sudden, violent event and not as a result of an inherent defect that reduced the property's value without inflicting physical harm to the product.
2. **Torts: Negligence: Strict Liability: Case Disapproved.** To the extent that *Hawkins Constr. Co. v. Matthews Co., Inc.,* 190 Neb. 546, 209 N.W.2d 643 (1973), held that strict liability in tort may not be used to recover for physical harm to property only, it is disapproved.
3. **Torts: Negligence: Strict Liability.** The purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Fredric H. Kauffman and Terry R. Wittler of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

Michael G. Helms of Schmid, Ford, Mooney & Frederick, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

MCCOWN, J.

This is an action under various tort and contract theories to recover all or a portion of the cost of conducting a retrofit program to replace all steel tubing manufactured and sold by the defendant to plaintiff and incorporated into cranes manufactured and sold to ultimate users or consumers by the plaintiff. The District Court sustained defendant's demurrers and dismissed plaintiff's petitions. The plaintiff has appealed.

The plaintiff, National Crane Corporation, is a Nebraska corporation which manufactures and sells a diversified line of cranes. The defendant, Ohio Steel Tube Company, is an Ohio corporation engaged in the business of designing and manufacturing various types of steel tubing.

During the period beginning in July 1970 and ending in May 1975, plaintiff purchased sections of welded steel tubing from the defendant for use in the tilt cylinder mechanism of cranes manufactured by plaintiff. During the period of time from January 1, 1971, to June 1, 1976, 1,232 cranes manufactured by plaintiff utilizing the steel tubing purchased from defendant were sold by the plaintiff to various customers.

Failures of the tilt cylinder mechanism of the cranes containing the steel tubing supplied by defendant commenced on April 4, 1973, when the first failure occurred. Three more failures occurred in 1974. Each failure was reported to defendant by plaintiff. Defendant represented to the plaintiff that the first failure was due to an inadequacy of material specification. In two 1974 cases defendant acknowledged the failure was due to an imperfection in the weld, and in the other reported that the

material met specifications and the weld was satisfactory.

In March 1975, following inquiry by plaintiff, defendant advised plaintiff that the tubing which had been and was still being furnished to plaintiff had been thoroughly and completely tested. The last tubing manufactured by the defendant and involved in this case was delivered to plaintiff in May 1975.

Between January 1976 and June 1976 four more cylinder failures occurred, each of which was also reported to defendant. All the cranes involved in this action were sold by June 1, 1976.

In July 1976 plaintiff launched its own internal investigation and analysis of the cylinder failures which were being reported. Three additional cylinder failures occurred between July 22 and November 5, 1976, in one of which a loss of life occurred.

By December 1976 plaintiff's testing and investigation reflected that the failures were not caused by overloading or piston seal leakage and that the cylinder design was adequate. Although plaintiff concluded that the cylinder failure problem must lie with the cylinder material, it was unable to reach specific, precise conclusions on which it could reasonably rely.

On December 29, 1976, plaintiff engaged independent engineering and testing consultants to assist in determining the precise cause of the cylinder failures. Thereafter, and throughout the year 1977, representatives of the plaintiff met with representatives of the defendant, and the defendant was advised of the status of the engineering testing and evaluation being carried on.

Between January 17 and December 7, 1977, four more cylinder failures occurred. In January 1978 defendant formally advised plaintiff that it would not participate in the testing and evaluation program because defendant believed the failures were

not the result of any defects in defendant's manufacturing.

In May 1978 plaintiff was advised by its engineering and technical consultants that material and product defects existed in the welded tubing used in the manufacture of the boom cylinders for plaintiff's cranes. Plaintiff was informed that unexpected failures of the cylinders could occur at any time without warning and that to insure the safety of others the cylinders must be replaced.

Plaintiff undertook a retrofit program to replace all of the potentially dangerous cylinders with suitable and safe substitute cylinders, and expended $1,078,960 in testing and replacing the defective tubing manufactured by defendant and incorporated in cranes manufactured and sold by plaintiff.

Plaintiff filed its petition in this proceeding on June 20, 1980, seeking recovery of the costs and expenses of the retrofit program under three different theories based on the basic facts set out above. The 15 actual failures are not involved. The first cause of action was for breach of express and implied warranties. The second cause of action was for negligent manufacture of tubing known to be dangerous unless carefully made. The third cause of action was pleaded on the basis of strict liability.

The defendant demurred to the petition on the grounds that the first cause of action was barred by the statute of limitations and the other two causes of action were not available for the recovery of economic loss. The District Court sustained the demurrer on those grounds.

Plaintiff filed an amended petition alleging the same facts but seeking recovery under theories of indemnity and contribution. Defendant demurred to the causes of action in the amended petition upon the grounds that they either were barred by the applicable statute of limitations or were unavailable to the plaintiff, the plaintiff being a volunteer in the alleged action. The District Court sustained de-

fendant's demurrer to the amended petition. Plaintiff elected to stand on the original and amended petitions and the court dismissed them. Plaintiff has appealed.

Plaintiff contends that the principles of tort law should be extended to permit plaintiff to recover the economic losses incurred under the retrofit program involved here, and that plaintiff should not be limited to recovery on the contractual basis of express or implied warranties. The argument is that because the plaintiff and defendant might be liable to an ultimate user or consumer of plaintiff's cranes under tort theories of liability if the defective tubing were not replaced, therefore the expense of eliminating that potential tort liability as between plaintiff and defendant is recoverable as a tort claim rather than being recoverable under contract law as a claim for the breach of express or implied warranties under the Uniform Commercial Code.

The great majority of courts which have considered the issue have held that the purchaser of a product pursuant to contract cannot recover economic losses from the manufacturer on claims based on principles of tort law, in the absence of property damage or personal injury from the use of the product. See *Jones & Laughlin Steel v. Johns-Manville Sales,* 626 F.2d 280 (3d Cir. 1980), and cases and authorities there cited.

The line of demarcation between physical harm and economic loss has been said to reflect the line of demarcation between tort theory and contract theory. See *Alfred N. Koplin & Co. v. Chrysler Corp.,* 49 Ill. App. 3d 194, 364 N.E.2d 100 (1977), and cases there cited. "Economic loss" in that case was defined by the court as " 'damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits—without any claim of personal injury or damage to other property * * *.' " *Id.* at 199, 364 N.E.2d at 103.

Chief Justice Traynor analyzed the distinction

which the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss. "He [the manufacturer] can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone." *Seely v. White Motor Co.*, 63 Cal. 2d 9, 18, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965).

Dean Prosser, after pointing out that a seller's liability for negligence covers any kind of physical harm, including not only personal injuries but also property damage, said: "But where there is no accident, and no physical damage, and the only loss is a pecuniary one, through loss of the value or use of the thing sold, or the cost of repairing it, the courts have adhered to the rule . . . that purely economic interests are not entitled to protection against mere negligence, and so have denied the recovery." W. Prosser, Law of Torts, *Products Liability* § 101 at 665 (4th ed. 1971).

The rule that the purchaser of a product pursuant to contract cannot recover economic losses from the manufacturer under a claim of strict liability in tort has been adopted by this court. In *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), we said: "From a review of the authorities and giving maximum import to the basic doc-

trine of strict tort liability, we feel that the doctrine of strict tort liability was not conceived as a substitute for warranty liability in cases where the purchaser has only lost the benefit of his bargain. . . . If the loss is merely economic, the Uniform Commercial Code has given the purchaser an ample recourse under the particular provisions and requirements of the code." *Id.* at 561-62, 209 N.W.2d at 653.

Sections 323, 395, and 402 A and B of the Restatement (Second) of Torts (1965) all apply to tort liability for "physical harm." The title of § 402 A is "Special Liability of Seller of Product for Physical Harm to User or Consumer." The section then provides: "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if . . . ." *Id.* at 347-48.

The Restatement sections referred to are applicable only where the product causes physical harm. Nowhere in the comments or illustrations does the Restatement indicate that the doctrine of strict liability covers economic loss in the absence of physical harm caused by the product. In addition, Neb. Rev. Stat. § 25-21,180 (Reissue 1979) defines a product liability action as an action brought "for or on account of personal injury, death, or property damage caused by" the product. The statute refers only to physical harm, not to economic loss.

Section 402 A specifically applies to liability for physical harm caused to the ultimate user or consumer or to his property. It is the unanimous view of the courts that plaintiffs may utilize a strict liability cause of action to recover for damage to property other than the defective product. That consensus is not present, however, as to damage to the defective product itself.

Damage to the product itself is sometimes characterized as economic loss or indirect loss resulting

from the inability to make use of the defective product or loss of the benefit of the bargain. The difficulty in determining whether to apply strict liability for any type of economic loss results from the distinction between tort doctrine of strict liability and contract theory embodied in the Uniform Commercial Code.

A majority of courts that have considered the applicability of strict liability to recover damages to the defective product itself have permitted use of the doctrine, at least where the damage occurred as a result of a sudden, violent event and not as a result of an inherent defect that reduced the property's value without inflicting physical harm to the product. See *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W. Va. 1982). In essence, this court has reached the same result. See *Morris v. Chrysler Corp.*, 208 Neb. 341, 303 N.W.2d 500 (1981).

To the extent that *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), held that strict liability in tort may not be used to recover for physical harm to property only, it is disapproved. To hold otherwise would penalize the fortunate persons who escape personal injury and ignore the specific language of § 402 A of the Restatement and a virtually unbroken line of decisions of other courts.

In the case at bar the facts pleaded establish that the damages sought to be recovered are the costs and expenses of removing the defective tubing manufactured by the defendant and replacing it. Such damages are not damages resulting from physical harm caused by the defective product. Instead, they are damages resulting from the purchase of defective or unsatisfactory products.

Plaintiff contends that because the "economic loss" here was incurred to remove a potential future liability in tort, such expenses are recoverable by a tort action under theories of negligent manufacture

or strict liability in addition to an action under a warranty or contract theory.

At this point it should be noted that the parties tacitly concede that, upon the facts pleaded in the instant case, the plaintiff stated a cause of action against the defendant under a warranty or contract theory of liability. That cause of action, however, was barred by the statute of limitations under the Uniform Commercial Code, and the plaintiff does not seriously contend that the sustaining of the demurrer to the first cause of action on that ground was erroneous. Instead, plaintiff's position is that the facts pleaded gave rise to two separate causes of action, one in tort and one in contract under a theory of express or implied warranty.

The proper relationship between tort law and the Uniform Commercial Code dictates that a cause of action for "economic loss" under the facts of the present case be pursued under a warranty or contract theory. The fact that the incurring of replacement costs here also removed a potential future tort liability to ultimate users or consumers does not convert economic loss into physical harm, nor transform a contract warranty cause of action into a product liability tort action. It should again be noted that the 15 cases in which actual failures in defendant's product occurred are not involved in this litigation.

We hold that the purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product.

Plaintiff's amended petition, relying on the same basic facts, sets out purported causes of action seeking to recover on the basis of indemnity or contribution. Before a right to indemnity or contribution arises, the underlying liability must first be established. In this case defendant has been found not

liable to the plaintiff in contract or in tort on the basic facts pleaded, and therefore cannot be liable to the plaintiff for indemnity or contribution on the same facts.

The action of the District Court in sustaining demurrers to the petition and amended petition was correct and is affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurs in the result.

CLINTON, J., not participating.

BOSLAUGH, J., dissenting.

It has been said that the underlying rationales of the doctrine of product liability are (1) consumer protection and compensation, (2) risk distribution, and (3) deterrence of defective manufacture. Note, *Comparative Contribution and Strict Tort Liability: A Proposed Reconciliation,* 13 Creighton L. Rev. 889 (1980). To require that an injury to a third person must occur before an action for damages in tort arises between the manufacturer and supplier defeats these rationales.

The majority opinion holds that the plaintiff can not recover in tort for what it terms "pure economic loss." The rationale for this is that the plaintiff had a cause of action for such losses under the warranty provisions of the Uniform Commercial Code. Further, because there is no underlying liability in tort to an injured party, and because there was no express contract provision between the parties, the plaintiff has no right to indemnity or contribution.

Generally, a manufacturer is under a duty to protect the consumer from the risk of unreasonable harm and a duty to use due care in product manufacture and design. Thus, in products liability a manufacturer can be sued both in strict tort and negligence. *Kohler v. Ford Motor Co.,* 187 Neb. 428, 191 N.W.2d 601 (1971); *Friedrich v. Anderson,* 191 Neb. 724, 217 N.W.2d 831 (1974). Actions on both theories are also available against the supplier of a component part. *City of Franklin v. Badger Ford*

Truck Sales, 58 Wis. 2d 641, 207 N.W.2d 866 (1973). Should the manufacturer be held liable in tort for a defect caused by a supplier, courts permit the manufacturer to recover from the supplier. *Hill v. Joseph T. Ryerson & Son, Inc.,* 268 S.E.2d 296 (W. Va. 1980). However, as indicated in the majority opinion, courts have generally required an injury to person or property and have not permitted an action in tort for pure "economic loss" against a supplier or manufacturer.

The majority reasons that the loss suffered by the plaintiff was an economic one, as there was no claim for injury or property damage to anything other than the product itself. The proper action, it states, was in warranty only. Had an injured party sued National Crane, National Crane would have been permitted recovery from Ohio Steel Tube.

The effect of the decision is to require that some injury occur either to a person or to property before a manufacturer can recover from the supplier of material or a defective party independently in tort or under theories of indemnity or contribution. Such a result is inconsistent with the policies of consumer protection, risk distribution, deterrence, and equity underlying products liability theories.

It would seem that the plaintiff should be entitled to recover independently in tort from the supplier for the losses suffered to retrofit the cranes. Several rationales are available: (1) The loss resulted from the duty to provide a safe product and was not a "pure economic loss"; (2) The Uniform Commercial Code remedy was inappropriate for such losses; (3) The economic loss distinction is a specious one and should be abolished; and (4) It is against public policy to require an injury before a manufacturer can recover from a supplier of defective material or parts.

The expenses incurred in plaintiff's retrofit program do not fall neatly into the category designated "economic loss," for which most jurisdictions do not

permit recovery in tort. " 'Economic loss' is defined as the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold." Note, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages — Tort or Contract?*, 114 U. Pa. L. Rev. 539, 541 (1966) (definition quoted in *Alfred N. Koplin & Co. v. Chrysler Corp.*, 49 Ill. App. 3d 194, 364 N.E.2d 100 (1977)). Generally, the cases which have held that economic loss is recoverable only under the warranty provisions of the Uniform Commercial Code have dealt with defects which affected the product's performance but did not present an unreasonable risk of harm to persons or property outside of the product itself. See, e.g., *Alfred N. Koplin & Co., supra* (air-conditioner breakdown); *Jones & Laughlin Steel v. Johns-Manville Sales,* 626 F.2d 280 (3d Cir. 1980) (roof material blistered and cracked); *Morrow v. New Moon Homes, Inc.,* 548 P.2d 279 (Alaska 1976) (defects in mobile home); *Fredonia Broadcasting Corp., Inc. v. RCA Corporation,* 481 F.2d 781 (5th Cir. 1973) (defective broadcasting equipment). The rationale behind these cases was expressed in *Seely v. White Motor Co.,* 63 Cal. 2d 9, 18, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965): "[A consumer] can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will." Such manufacturer agreements or warranties are covered in the Uniform Commercial Code.

In the present case it would seem that the retrofit program was conducted in order to fulfill both the plaintiff's and the defendant supplier's duty in tort to protect the consumer from the risk of unreasonable harm. Courts have indicated that manufacturers must take post sale remedial measures once an excessive danger is discovered in a product line. *Braniff Airways, Inc. v. Curtiss-Wright Corporation,* 411 F.2d 451 (2d Cir. 1969), *cert. denied* 396 U.S. 959,

90 S. Ct. 431, 24 L. Ed. 2d 423 (duty to remedy defective aircraft engines); *Sterling Drug, Inc. v. Yarrow,* 408 F.2d 978 (8th Cir. 1969) (duty to have detail men personally contact physician regarding side effect of drugs). See discussion of this duty in Ramp, *The Impact of Recall Campaigns on Products Liability,* 44 Ins. Couns. J. 83 (1977). The imposition of such a duty comports with the underlying rationales of products liability.

The plaintiff should be entitled to recover in tort for the losses incurred as a result of the retrofit program, because the expenses were not pure economic losses but, rather, were expenses incurred to fulfill both parties' duty in tort to the consumer. When a manufacturer has conducted a recall program necessitated by the duty to protect the consumer, that manufacturer should have an action in tort against the supplier of a defective part, provided that the defect caused the recall and was the result of negligent manufacture or design, or presented an unreasonable risk of harm. An injury to a third person or to property should not be a prerequisite.

The court reasons that since the warranty provisions of the Uniform Commercial Code provided a remedy, its refusal to extend tort liability is justified. However, it does not seem that the Uniform Commercial Code was designed with such losses in mind, that is, losses which stem from the post sale duty in tort to the consumer. The Uniform Commercial Code is primarily concerned with contract notions of losses on bargains and the expectations of parties. It is neutral on consumer safety. Ribstein, *Guidelines for Deciding Product Economic Loss Cases,* 29 Mercer L. Rev. 493 (1978).

For example, the losses incurred to finance a recall program are consequential, not actual, damages under the Uniform Commercial Code. See Neb. U.C.C. §§ 2-714, 2-715 (Reissue 1980). The test for such damages is whether the losses were foreseeable by the seller at the time of the contracting.

See *Burgess v. Curly Olney's, Inc.*, 198 Neb. 153, 251 N.W.2d 888 (1977). One commentator has stated that this test, when applied to recall situations, requires consideration of other factors, i.e., the willfulness of the breach and the relative sizes of the economic units involved, before an equitable result under the law of contract can be reached. This author proposes legislative changes to handle allocating the risk of loss in recall situations. Stone, *Recovery of Consequential Damages for Product Recall Expenditures,* 1980 B.Y.U. L. Rev. 485; Stone, *Allocation of Risk for Product Recall Expenditures: A Legislative Proposal,* 1975 Det. C.L. Rev. 1. Arguably, the equitable doctrine of contribution may be better suited to the recall situation, as both are based upon tort concepts. See, Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases,* 58 Minn. L. Rev. 723 (1974); Note, *Comparative Contribution and Strict Tort Liability: A Proposed Reconciliation,* 13 Creighton L. Rev. 889 (1980).

Further, the disclaimer provisions of the Uniform Commercial Code permit a seller to limit his liability for consequential damages, provided the disclaimer is not unconscionable. In strict tort, courts do not permit a disclaimer to bar liability when a person or property is damaged. *Sipari v. Villa Olivia Country Club,* 63 Ill. App. 3d 985, 380 N.E.2d 819 (1978). See *Haugen v. Ford Motor Company,* 219 N.W.2d 462 (N.D. 1974). However, the courts will not apply strict tort where the loss is "economic," and will uphold the disclaimer. The effect of the decision in the present case is to term the costs of fulfilling a duty in tort an "economic loss" and thus permit a supplier to avoid his responsibility for product safety by shifting it to the manufacturer through disclaimer—at least until an accident occurs. To require an accident rather than permit the costs of a preventive recall program to be allocated to the supplier when a disclaimer is present contra-

dicts the policies of consumer protection, risk allocation, and deterrence, upon which the duty to recall is founded.

Thus, the Uniform Commercial Code seems inappropriate as a sole remedy in this situation because it is concerned not with product safety for the intended consumer but with the benefit of the bargain between two commercial entities. In the recall situation the concern is for product safety, and the cost should be borne by the responsible party. Comment, *Comparative Causation, Indemnity, and the Allocation of Losses Between Joint Tortfeasors in Products Liability Cases,* 10 St. Mary's L.J. 587 (1979). A few courts have abolished the economic loss distinction and hold that such loss is recoverable both in tort and warranty. Generally, it is no objection that an alternative remedy was available to the plaintiff.

In *Berg v. General Motors,* 87 Wash. 2d 584, 555 P.2d 818 (1976), plaintiff was permitted to sue in negligence for lost profits. In listing its reasons the court said at 592-93, 555 P.2d at 822-23: "Second, we are not convinced of the accuracy of the statement made in *Curtiss-Wright* at page 482, that: 'It is only when the danger inherent in a defectively made article causes an accident that a cause of action against the manufacturer also arises.' A distinction that would allow recovery if the product in question destroyed the property of another, yet would deny recovery were the same product merely to disintegrate, is a specious one. . . . A manufacturer intending and foreseeing that its product would eventually be purchased by persons operating commercial ventures, owes such persons the duty not to impair that purchaser's commercial operations by a faulty product."

New Jersey has permitted recovery in strict tort for economic losses. *Santor v. A & M Karagheusian, Inc.,* 44 N.J. 52, 66, 207 A.2d 305, 312 (1965) (defect in rug): "[A]lthough the doctrine has been

applied principally in connection with personal injuries sustained by expected users from products which are dangerous when defective . . . the responsibility of the maker should be no different where damage to the article sold or to other property of the consumer is involved." In *Monsanto v. Alden Leeds,* 130 N.J. Super. 245, 259, 326 A.2d 90, 97 (1974), the court said, "Injuries to a man's business can be as detrimental to our society as injuries to his person."

The plaintiff should be able to recover from the supplier under an indemnity or contribution theory. Contribution is an equitable doctrine which divides the losses between tort-feasors. Contribution applies where both parties are under a common liability to the injured party and one party has paid more than his share of the burden. Note, 13 Creighton L. Rev., *supra.* Indemnity, also an equitable concept, transfers the entire loss to the tort-feasor who ought to bear it. *Id.* The right to indemnity or contribution can arise either through express agreement or implication of law. Phillips, *Contribution and Indemnity in Products Liability,* 42 Tenn. L. Rev. 85 (1974). See *Tober v. Hampton,* 178 Neb. 858, 136 N.W.2d 194 (1965).

In product liability actions a manufacturer can seek indemnity from the maker of a defective component part. *Hill v. Joseph T. Ryerson & Son, Inc.,* 268 S.E.2d 296 (W. Va. 1980). The issue presented here is whether a manufacturer can recover under indemnity or contribution if there has been no injury to a third person for which judgment or settlement has been had against the manufacturer.

The reasoning of the majority in the present case appears to follow that expressed in *Waldinger Co. v. P & Z Co., Inc.,* 414 F. Supp. 59, 60 (D. Neb. 1976): "Contribution and indemnification are inchoate rights which do not arise until one tort feasor has paid more than his share of the damages or judgment."

However, it does not appear that a judgment is always required before recovery in contribution or indemnity can be had. Restatement of Restitution § 86, Comment d at 391 (1937), states: "The rule stated in this Section is applicable whether or not suit has been brought by the injured person against the payor. If, however, suit is not brought by the injured person, and the payor seeks restitution from a fellow tortfeasor, it is necessary for him to prove that his payment terminated or reduced a valid claim against the other . . . ." Section 86 at 389 states, "A person who has discharged a tort claim to which he and another were subject is entitled to indemnity or contribution . . . ." The illustrations indicate that settlements are contemplated by this section.

In Restatement (Second) of Torts § 886B at 344 (1979), it is stated: "(1) If two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability."

The Comment states that the basis for indemnity is restitution, which seeks to prevent unjust enrichment. A person confers a benefit when he saves the other from expense or loss.

Indemnity is permitted for settlement of a claim if the indemnitee can prove *at least potential liability* to the third party. *Central Nat. Ins. Co. v. Devonshire Coverage,* 565 F.2d 490 (8th Cir. 1977).

In *Burlington Northern, Inc. v. Hughes Bros., Inc.,* 671 F.2d 279, 283 (8th Cir. 1982), the court said: "As this court recently observed, 'the indemnitee need not prove its legal liability to the injured party when its indemnitor denies liability under a contract and refuses to assume defense of the claim or to otherwise hold the indemnitee harmless for any loss.' . . .

"BN notified Hughes of the claim and requested that it assume responsibility. BN also kept Hughes

informed about the settlement negotiations. Hughes refused to participate in any manner.

"In the present case, BN's potential liability under the FELA was established as a matter of law. . . . Under the FELA, BN possessed a 'nondelegable duty to provide its employees with a safe place to work.' . . . Additionally, BN was liable for its employee's injury if its negligence 'played any part, even the slightest, in producing the injury.' . . . The placement of the wall and the failure to remove the snow and ice were undisputably contributory factors . . . . Thus *the likelihood* that the railroad would be held liable was clearly established and the only issue which should have been submitted to the jury was the reasonableness of the amount of the settlement."

In *Parfait v. Jahncke Service, Inc.*, 484 F.2d 296 (5th Cir. 1973), *cert. denied* 415 U.S. 957, 94 S. Ct. 1485, 39 L. Ed. 2d 572 (1974), the court discussed the equitable concepts underlying implied indemnity between tort-feasors when one has settled an action without the consent of the other. The court held that a showing of potential liability was necessary in order to get indemnity.

In the present case both the manufacturer and the supplier owe a duty to the consumer. When the manufacturer is required to rectify a defect caused by the supplier which, under the law of strict liability, will almost certainly result in liability, the manufacturer should be permitted to maintain an action for indemnity. Such recall expenses terminate a potential valid claim against the supplier. To permit the supplier the benefit of this form of settlement is a form of unjust enrichment which equity seeks to prevent. To require an injury to a third person to occur before indemnity can be had would also seem to violate the principles of equity.

The following rule, suggested by the plaintiff, should be applicable in cases such as this: "One who sells a product in a defective condition unreasonably dangerous to a user or consumer is entitled

to receive indemnity from a supplier of a defective component part for the reasonable costs of remedying the defect, if

"(a) the defective condition is created by the supplier's defective component part;

"(b) the defective product creates a substantial risk of serious injury or loss of life to users or third parties;

"(c) a warning alone would be inadequate to avoid the risk created; and

"(d) the supplier of the defective component part has been given reasonable notice of the existence of the defect and an opportunity to provide, or participate in, the remedial action."

HASTINGS, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. VINCENT VAINIUNAS, APPELLANT.

331 N.W.2d 522

Filed March 25, 1983. No. 81-819.

Drunk Driving: Prior Convictions. The record of a conviction used for enhancement purposes in a prosecution for third offense driving while intoxicated must show on its face a voluntary and intelligent waiver of the right to counsel or that the defendant was represented by counsel.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger, for appellant.

Paul L. Douglas, Attorney General, and Martel J. Bundy, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

The defendant was convicted of third offense

driving while under the influence of intoxicating liquor and sentenced to 1 to 3 years' imprisonment. He has appealed and contends the sentence was excessive and that a prior conviction relied upon by the State was invalid for enhancement purposes.

In *State v. Smith, ante* p. 446, 329 N.W.2d 564 (1983), we held that the record of a conviction used for enhancement purposes in a prosecution for third offense driving while intoxicated must show on its face a voluntary and intelligent waiver of the right to counsel or that the defendant was represented by counsel.

At the enhancement proceeding the State introduced records of convictions in 1972 and 1978. Objection was made only to the record of the 1972 conviction.

The judgment in the 1972 case, dated September 1, 1972, recites: "Now, on this day, comes the City Prosecutor on behalf of the State of Nebraska and defendant, Vincent Vainiunas, is represented in court."

The appearance docket sheet for that case lists "Lawrence I. Batt" as attorney for the defendant. We think this is a sufficient showing on the record of that case that the defendant was represented by counsel in the District Court.

An additional record of the District Court entitled "Criminal Docket-Appeal Cases" contains several entries under the date of the judgment, some of which are lined out or partially lined out. The entries consist of rubber stamp impressions, with blanks filled in by writing. One such entry indicating sentence was deferred has the name "Batt" written in the blank for the name of defendant's counsel. This entry is crossed out, presumably because sentence was not deferred but was imposed on that date.

Another entry showing sentence was imposed contains no reference or showing as to whether defendant was represented by counsel. We do not think

these entries conflict with the judgment and the appearance docket.

The defendant is 65 years of age. He has six previous convictions for driving while intoxicated. On three other occasions the charges were dismissed or reduced. The sentence imposed was not excessive.

The judgment is affirmed.

AFFIRMED.

LARRY E. REISER ET AL., APPELLEES, V. MICHAEL HARTZLER ET AL., APPELLANTS.

331 N.W.2d 523

Filed March 25, 1983. No. 81-894.

1. **Special Assessments: Collateral Attack.** Where the physical facts are such that real property was not and could not be specially benefited by an improvement project, the assessment levied to pay for such improvement may be held to be arbitrary, constructively fraudulent, and therefore void and subject to collateral attack.
2. _____: _____. However, to sustain a collateral attack on a special assessment, it is necessary that the evidence support a determination that in fact the property in question was not and could not be specially benefited by the particular improvement.
3. _____: _____. Mere excessiveness of a special assessment may not be corrected in a collateral attack upon the assessment.
4. **Special Assessments: Proof.** A property owner who attacks a special assessment as void has the burden of establishing its invalidity.
5. **Equity: Special Assessments: Appeal and Error.** The review of a collateral attack upon a special assessment is a proceeding in equity, which this court reviews de novo on the record.

Appeal from the District Court for Cheyenne County: JOHN D. KNAPP, Judge. Reversed and remanded with directions to dismiss.

John P. Peetz III of John Peetz, P.C., for appellants.

P. J. Heaton, Jr., for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, HASTINGS, and CAPORALE, JJ., and BRODKEY, J., Retired.

HASTINGS, J.

The plaintiffs are the owners of certain residential lots located on the north side of Toledo Street in the city of Sidney. They brought this action in equity against the defendants, members of the city council and the city of Sidney itself, seeking to have declared null and void certain special assessments levied against their properties resulting from the paving of Toledo Street, alleging an absence of special benefits. The District Court found that the "[b]enefits to plaintiffs appear to the Court to be little, if any, greater than to the public at large," and ordered "that the taxes assessed, levied and collected from plaintiffs . . . were illegally assessed, levied and collected and that plaintiffs . . . shall be and are entitled to the refund of such taxes paid . . . ." The defendants on appeal to this court have alleged as errors: (1) That the plaintiffs failed to follow the specified statutory scheme for relief in this type of situation; and (2) That the evidence does not support a finding that plaintiffs' properties were not and could not be specially benefited so as to sustain a collateral attack on the assessment.

Neb. Rev. Stat. § 16-637 (Reissue 1977) provides generally that any party feeling aggrieved by any special assessment may pay the same under protest, shall give written notice to the city treasurer of an intention to sue to recover such payment and within 60 days thereafter shall have the right to bring a civil action to recover so much of such special taxes as may be shown to be illegal, inequitable, and unjust. Neb. Rev. Stat. §§ 19-2422, 19-2423, and 19-2425 (Reissue 1977) provide that any owner of real property who feels aggrieved by the levy of a special assessment may appeal the same, both as to the validity and amount thereof, to the District Court by filing with the city clerk a written notice of appeal

within 10 days of the levy and a petition on appeal and transcript with the District Court within 30 days of the levy of such special assessment.

Neither of these statutory procedures was complied with in this case. According to the contention of the defendants, these remedies are exclusive and therefore the plaintiffs' action should be dismissed. However, the plaintiffs cite the general rule that where it is alleged and proved that the physical facts are such that property was not and could not be specially benefited, the levy may be held to be arbitrary, constructively fraudulent, and therefore void and subject to collateral attack. *Nebco, Inc. v. Speedlin,* 198 Neb. 34, 251 N.W.2d 710 (1977). We agree with the position taken by the plaintiffs.

However, to sustain the action taken by the trial court, it is necessary that the evidence support a determination that in fact the property in question was not and could not be specially benefited by the paving of Toledo Street. Mere excessiveness of a special assessment may not be corrected in a collateral attack upon the assessment. A property owner who attacks a special assessment as void has the burden of establishing its invalidity. Since this is a proceeding in equity we examine the record de novo. *Nebco, Inc. v. Speedlin, supra.*

The properties which are the subject of this litigation are Lots 5 through 12, Block 2, Park Manor Estates Addition to Sidney. These properties form the southern tier of lots in the subdivision and, as previously mentioned, are located on the north side of Toledo Street. The front, or north side, of these lots borders on William Way, a street running generally east and west with an outlet onto Keller Drive which forms the eastern boundary of the subdivision and which, in turn, connects with Toledo Street to the south at a T-intersection. Presently, Toledo Street is accessible from Park Manor Estates only by way of Keller Drive.

Shortly before the formal plat and dedication of

Park Manor Estates, the then owners of that property created an easement over what is now the extreme south 16 feet of the properties in question. In other words, it covers a strip of ground lying at the extreme south, or rear side, of the properties, immediately adjacent to Toledo Street. The grantees of that easement were the City of Sidney, Kansas-Nebraska Natural Gas Company, Inc., Wheat Belt Public Power District, and Sidney Community T.V. Company. Its purpose was for the "construction, reconstruction, replacement, removal, maintenance, and operation of electrical lines, cable lines, natural gas mains, sewer lines and other utilities incident to the business of the Grantee . . . ." It provided for ingress and egress across the property described for the purposes named above, and further provided that "Except for the ingress and egress granted to the Grantee, there shall be no ingress or egress over the above described Easement by any parties other than the Grantee without the express written consent of the Grantor and the Grantee."

The evidence presented by the plaintiffs suggested that everyone concerned understood that there was no right of access to Toledo Street from the affected properties without getting the required permission. As a matter of fact, all of the lot owners have constructed a fence which runs along the south end of the lots and separates the easement from the right-of-way on which Toledo Street is located. Their testimony also admitted that there is no requirement that all of the houses face north, away from Toledo Street, but the fact is that all were constructed in that way. One of the plaintiffs did admit in his testimony that the paving of Toledo Street might have benefited the lots in question a little, particularly because of less dust. There was evidence adduced that the municipal park was located on the south side of Toledo Street, which drew a great deal of

traffic, and that in the years before the street was paved, the dirt street created a lot of dust.

Testifying in behalf of the defendants was the project engineer on this paving job. He stated that the total cost of the paving project was approximately $62 per foot, so that a full assessment for a lot bordering on the street would be $31 plus, whereas the lots in Park Manor Estates were assessed but $15.53 per foot. He explained this as simply a matter of fairness, because these were double-fronted lots, i.e., there was a paved street at both the front and rear. This was not an unusual procedure in making assessments, according to him, and he pointed to other areas within the city of Sidney where only one-quarter assessments were made on double-fronted lots.

However, this witness gave as his opinion that the assessments recommended by him and adopted by the city were in proportion to the special benefits to the lots, and, as a matter of fact, the benefits exceeded the amount of assessments. He described the benefits in this particular situation as resulting in an all-weather road to travel in and out of the area; the elimination of dust caused by traffic; the establishment of drainage within the area; the establishment of a uniform grade in the adjacent area, allowing proper landscaping; the elimination of borrow pits, which are a trap for casual water; reduced noise; and modernization.

We believe the record fully supports a conclusion that the lots in question received substantial benefits from the paving of Toledo Street. Whether the amount settled on was correct we need not and may not determine because that question is not properly before us. What we do determine is that the record fails to support a conclusion that the property in question was not and could not be specially benefited by the paving project. Therefore, the landowner plaintiffs have failed to meet their burden of proving

the invalidity of the special assessments, and such assessments shall stand.

The judgment of the District Court is reversed and the cause is remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WHITE, J., participating on briefs.

AUDREY D. HANCOCK, APPELLEE, V. STATE OF NEBRASKA EX REL. STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLANT.

331 N.W.2d 526

Filed March 25, 1983. No. 81-913.

1. **Statutes.** A penal statute is one by which a forfeiture is imposed for transgressing the provisions of the act and where the extent of liability imposed is not measured or limited by the damage caused by the act or omission.
2. _____. A penal statute is strictly construed, and its import may not be extended by construction to situations not clearly within its provisions. Nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute.
3. **Statutes: Words and Phrases.** The meaning of the word "know," when used in a penal statute, varies with the context in which it is used.
4. **Brokers: Contracts.** Under the provisions of Neb. Rev. Stat. § 81-885.24(14) (Reissue 1981), a real estate broker or salesperson will be considered to know of a prior listing contract if he has actual knowledge of it or if he had actual knowledge of facts that would cause a reasonably prudent person to believe such a contract existed.
5. _____: _____. A finding that a real estate salesperson "should have known that there was a possibility" of a prior listing contract does not meet the standard of knowledge required by Neb. Rev. Stat. § 81-885.24(14) (Reissue 1981).

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Robert H. Petersen, Special Assistant Attorney General, for appellant.

James R. Place of Breeling, Welling & Place, for appellee.

BOSLAUGH, MCCOWN, and HASTINGS, JJ., and BRODKEY, J., Retired, and RIST, D.J.

RIST, D.J.

This is an appeal from an order of the District Court of Douglas County, Nebraska, reversing an order of the State Real Estate Commission of Nebraska, which latter order had suspended the real estate salesperson's license of plaintiff-appellee, Audrey D. Hancock, for a period of 30 days. The District Court held the commission's order to be arbitrary and capricious and ordered it set aside.

The following facts are relevant. On April 21, 1980, Angelina Prochaska entered into an exclusive real estate listing contract with Henry A. Hrdlicka, a licensed realtor, for the sale of Prochaska's residence in Wahoo, Nebraska. The contract provided the listing should continue to October 21, 1980. Hrdlicka placed his "for sale" sign on the premises sometime in April 1980. At some time thereafter and prior to July 26 of that year, the sign was lying on the ground and remained in that condition during the pertinent times thereafter.

On or about July 26, 1980, appellee, a licensed real estate salesperson, upon advice from others in the firm for which she worked that the Prochaska home might be for sale, made an appointment on July 27 to see Mrs. Prochaska. On arrival at the residence Hancock noticed the Hrdlicka sign lying in the yard. She asked Prochaska if Prochaska had listed the house before and Prochaska advised she had, but that she had "fired" Hrdlicka and that the property was no longer listed with him. Hancock then prepared a listing contract, which Prochaska signed, and shortly thereafter Hancock sold the house.

Hrdlicka then filed a complaint against Hancock with the State Real Estate Commission, alleging in

substance that Hancock had violated Neb. Rev. Stat. § 81-885.24(14) (Reissue 1981) by negotiating a listing and sale contract when she knew or should have known of another outstanding listing contract.

At the commission hearing Hrdlicka testified that Prochaska had told him sometime after the original listing that she was taking the house off the market, but denied he released her from his listing contract. He did testify that illness during the listing period limited his ability to carry on his real estate business. He said he first learned of the other listing in early August and later advised Hancock's firm of the fact that he also had a listing contract.

Prochaska testified at the commission hearing that after she had listed her home with Hrdlicka she became dissatisfied with his lack of effort in selling the property; that she called him by telephone and told him of this and that she was discharging him. She further testified that Hrdlicka asked what he should do with the listing contract, and she told him to throw it away and to pick up his sign. She said Hrdlicka told her he would have his son pick up the sign, but it was never done. Hrdlicka denied this conversation took place.

Hancock testified at the hearing that when Prochaska told her she had fired Hrdlicka, Hancock assumed a cancellation of that listing contract. She made no further inquiry about it. Through her efforts the Prochaska property was sold on August 20, 1980.

The broker for whom Hancock worked testified that Hrdlicka made no contact with them about this matter until August 20, 1980, when he inquired about his commission.

On January 27, 1981, the commission, following hearing, found that Hancock had entered into a listing agreement with Prochaska "when *she should have known that there was a possibility* that Hrdlicka had not released Prochaska from her obligation under his listing," by virtue of which she

violated the statute previously noted "by negotiating directly with Prochaska to withdraw from or break such listing contract for the purpose of substituting, in lieu thereof, a new listing contract granting an exclusive agency . . . to Hancock's employing broker." (Emphasis supplied.) The commission ordered Hancock's real estate salesperson's license suspended for 30 days. It was this action that was appealed by Hancock to the District Court, which court, on November 17, 1981, found that such order was not supported by substantial evidence, and vacated and set it aside as arbitrary and capricious.

The scope of review was treated in the briefs as being governed by Neb. Rev. Stat. § 81-885.31 (Reissue 1976). We note said section was repealed, effective February 18, 1981, and Neb. Rev. Stat. § 81-885.30 (Reissue 1981), then in effect, provided for judicial review of the commission's action under Neb. Rev. Stat. §§ 84-917 to 84-919 (Reissue 1981). These latter sections, insofar as material herein, provide that the case on appeal will be considered on the record of the agency involved, and the action reversed or modified if unsupported by competent, material, and substantial evidence, or when arbitrary or capricious. The latter sections govern since they were in effect at the time the District Court heard and acted upon the appeal. *Happy Hour, Inc. v. Nebraska Liquor Control Commission,* 186 Neb. 533, 184 N.W.2d 630 (1971); *Lovelace v. Boatsman,* 113 Neb. 145, 202 N.W. 418 (1925).

Section 81-885.24(14) gives the commission power to revoke or suspend a real estate license when the licensee has been found guilty of, among others, the following unfair trade practice: "(14) Negotiating a sale . . . [or] listing . . . of real estate directly with an owner . . . if he or she knows that such owner has a written outstanding listing contract in connection with such property granting an exclusive agency or an exclusive right to sell to another broker, or negotiating directly with an owner to withdraw from or

break such a listing contract for the purpose of substituting, in lieu thereof, a new listing contract granting an exclusive agency . . . to sell to himself or herself or his or her employing broker."

A basic issue is the construction of this statute. Appellee argues that the statute is penal in nature, must be strictly construed, that the commission cannot read into the statute a duty that she "should have known" of Hrdlicka's contract, and that the statute requires a showing that she in fact "knew" such a contract existed. Appellant argues that Hancock knew of the possibility of Hrdlicka's having a contract, that she should have known Prochaska could not cancel it unilaterally by "firing" Hrdlicka, that she should have made further inquiry about it, and that under these circumstances she has violated the statute.

We conclude that the statute is penal in nature and must be strictly construed. A penal statute is one by which a forfeiture is imposed for transgressing the provisions of the act and where the extent of the liability imposed is not measured or limited by the damage caused by the act or omission. *Department of Banking v. McMullen,* 134 Neb. 338, 278 N.W. 551 (1938). A penal statute is strictly construed, and its import may not be extended by construction to situations not clearly within its provisions. *Anderson v. Robbins Incubator Co.,* 143 Neb. 40, 8 N.W.2d 446 (1943); *Shamberg v. City of Lincoln,* 174 Neb. 146, 116 N.W.2d 18 (1962); *Misle v. Miller,* 176 Neb. 113, 125 N.W.2d 512 (1963); *Bachus v. Swanson,* 179 Neb. 1, 136 N.W.2d 189 (1965). In construing a penal statute nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute. *Misle v. Miller, supra.*

In light of these rules of construction, we turn to the meaning of the word "know" as used in the statute under consideration. The meaning of the word "know" or "knowingly" in a penal statute varies in

the context in which it is used. *R. D. Lowrance, Inc. v. Peterson,* 185 Neb. 679, 178 N.W.2d 277 (1970). We have considered a number of penal statutes in which the word is used with respect to the actions of others or of facts not in the actual knowledge of the person to whom the statute is applied. A statute making it an offense to leave the scene of an accident "knowing" that injury has resulted to another has been held to mean actual, not constructive, knowledge, or such notice as would put one on inquiry, and more than mere negligence in failing to know, or the mere presence of facts which might have induced belief in the mind of a reasonable person. *State v. Dougherty,* 358 Mo. 734, 216 S.W.2d 467 (1949). A statute making it a crime to "knowingly" receive stolen goods has been held to require a person to have such information from facts which should convince him that the property was stolen, or which should lead a reasonable man to believe they have been stolen, before, in a legal sense, he knew they were stolen. *Pettus v. State,* 200 Miss. 397, 27 So. 2d 536 (1946). See, also, *Bennett v. State,* 211 So. 2d 520 (Miss. 1968). A statute making it unlawful for a person to "knowingly" deliver liquor intended for sale in a dry territory has been held to require such person to have such information as would cause a person of ordinary prudence to believe the liquor was to be so sold, before being liable under the statute. *American Express Co. v. Commonwealth,* 171 Ky. 1, 186 S.W. 887 (1916). In *Leary v. United States,* 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), the Supreme Court was considering offenses involving the "knowing" transportation of marijuana, and in footnote 93 of the opinion it accepted the Model Penal Code definition of knowledge: "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." *Id.* at 46.

We conclude from an examination of these authorities and the statute here involved that a broker or salesperson will be considered to "know" of a prior listing contract if he had actual knowledge of it or if he had actual knowledge of facts that would cause a reasonably prudent person to believe such contract existed.

Applying this standard to the commission's finding that appellee "should have known that there was a possibility" of a prior contract, we determine that such finding does not meet the standard of knowledge required to show a violation of this statute. The commission was apparently unwilling on the evidence before it to find that appellee had such knowledge as would meet the necessary standard set out above, and its failure to make such a finding is fatal to its action. In that sense the commission's action is arbitrary and capricious, being an action taken on findings of fact that do not represent a breach of conduct within the terms of the statute.

We further note that under the provisions of §§ 84-917 to 84-919, which govern the scope of our review, we are not at liberty on the record in this case to make other or different findings of fact than those determined by the commission, so the latter's findings must stand as the factual determination herein. See, *The 20's, Inc. v. Nebraska Liquor Control Commission,* 190 Neb. 761, 212 N.W.2d 344 (1973); *Gosney v. Department of Public Welfare,* 206 Neb. 137, 291 N.W.2d 708 (1980).

We need not determine other issues raised in light of our decision on the issue set forth above.

Accordingly, the order of the District Court vacating and setting aside the commission's order of suspension and dismissing the complaint against appellee is affirmed.

AFFIRMED.

DOROTHY M. EVANS, APPELLEE, V. CHARLES W. EVANS, APPELLANT.

331 N.W.2d 531

Filed March 25, 1983. No. 82-012.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Charles W. Evans, pro se.

Frost & Meyers, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and BUCKLEY, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

The court, having considered oral arguments and having reviewed the record de novo, finds that the decree of the trial court should be affirmed.

AFFIRMED.

JACK MANN, APPELLEE, V. ROBERT GLEASON AND BETTY GLEASON, APPELLANTS.

331 N.W.2d 531

Filed March 25, 1983. No. 82-128.

Appeal from the District Court for Nance County: JOHN M. BROWER, Judge. Affirmed. See Rule 7A.

Philip T. Morgan of Morgan & Morgan, for appellants.

No appearance for appellee.

KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

The judgment is supported by substantial evidence in the record as a whole, and no error of law appears.

AFFIRMED. SEE RULE 7A.

BEYNON FARM PRODUCTS CORPORATION, APPELLANT, V. THE BOARD OF EQUALIZATION OF GOSPER COUNTY, NEBRASKA, APPELLEE.

331 N.W.2d 531

Filed March 25, 1983. No. 82-188.

1. **Taxation: Appeal and Error.** An appeal from a county board of equalization is tried in this court de novo as in an equitable proceeding.
2. **Taxation.** Neb. Rev. Stat. § 77-201 (Reissue 1981) requires that real estate not expressly exempted therefrom be taxed at actual value.
3. **Taxation: Presumptions.** In the absence of other evidence, proof that the guidelines provided by the Tax Commissioner were applied correctly raises a presumption that the assessment is legally proper.
4. **Taxation: Valuation.** Authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value; they are required to use methods and consider such relevant factors as result in a proper assessment.
5. _____: _____. A landowner is entitled to have his property assessed uniformly and proportionately with other property even though the result may be that it is assessed at less than actual value.
6. **Taxation.** Misclassifying property may result in a lack of uniformity and proportionality; in such an event the taxpayer is entitled to relief.

Appeal from the District Court for Gosper County: JACK H. HENDRIX, Judge. Reversed and remanded with directions.

Ira D. Beynon and John H. Sohl, for appellant.

Carlton E. Clark, Gosper County Attorney, for appellee.

BOSLAUGH and CAPORALE, JJ., and SPENCER and BRODKEY, JJ., Retired, and GRANT, D.J.

CAPORALE, J.

Plaintiff-appellant, Beynon Farm Products Corporation (Beynon), appeals from the judgment of the District Court finding the actual value of its quarter section of agricultural real estate in Gosper County for taxation purposes in 1981 to be $188,070, including an assessment of $11,240 for the single improvement

of a grain bin and associated equipment. That value was fixed by the county assessor and left undisturbed by the defendant-appellee, Board of Equalization of Gosper County. We reverse.

Beynon has made two assignments of error, the first being that the District Court erred in holding the county assessor did not act in an arbitrary, capricious, discriminatory, and illegal manner in increasing the assessed value of its property; and, secondly, that the District Court erred in holding the county could legally increase the value of plaintiff's property for taxation by relying entirely on the Nebraska Department of Revenue's manual published for valuation purposes, and also on opinions of certain members of that department, both of which are allegedly unsupported by the evidence required by the taxing statute. The imprecision of these assignments makes it difficult to determine exactly what it is that plaintiff is complaining about, except the ultimate claim that its property has been assessed at too great a value. Although plaintiff's petition on appeal asserts, among sundry other things, that the valuation of its property has not been equalized with the valuations of similar property in Gosper County, there is no competent evidence to support that allegation except, as is seen in the discussion which follows, with respect to 15 acres which the record establishes were misclassified.

Article VIII, §§ 1 and 5, of the Nebraska Constitution requires that taxes be levied "uniformly and proportionately." Neb. Rev. Stat. § 77-201 (Reissue 1981) requires that real estate not expressly exempted be taxed at actual value. Actual value has been held to mean fair market value. *Hastings Building Co. v. Board of Equalization,* 212 Neb. 847, 326 N.W.2d 670 (1982); *Beaver Lake Assn. v. County Board of Equalization,* 210 Neb. 247, 313 N.W.2d 673 (1981). Neb. Rev. Stat. § 77-112 (Reissue 1981) provides: "Actual value of property for taxation shall mean and include the value of property for taxation

that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; (6) market value in the ordinary course of trade; and (7) existing zoning of the property." Neb. Rev. Stat. § 77-1330(1) (Reissue 1981) provides: "The Tax Commissioner shall prepare, issue, and annually revise guides for county assessors in the form of handbooks of rules and regulations, appraisal manuals, special manuals and studies, cost and price schedules, news and reference bulletins, property tax laws, and memorandums. County assessors shall continually use such guides in the performance of their duties. All appraisals or reappraisals of property for tax purposes shall be in compliance with such manuals and guides."

With the foregoing rules in mind, we review the pertinent evidence in this case. No independent expert testified at the District Court trial as to the actual or fair market value of the property in question. Ira D. Beynon, president of the plaintiff corporation, testified that a portion of the land was low and was consequently inundated with water such that 10 acres were useless and an additional 5 acres were nearly so. He nonetheless plants these acres because it is too much trouble to turn the tractor around before he gets to them. Mr. Beynon, who has had experience in buying, selling, and valuing farmland, answered the following question affirmatively: "And that you are actually saying that the total property — the total value of the property and improvements for this farm should be a hundred and sixty thousand, some higher?" Plaintiff's protest, received in evidence, asked that the valuation of the realty and improvement be reduced to $161,110. The only evidence as to the value of the low-lying 15 acres was Mr. Beynon's testimony that

10 of those acres were worth $100 per acre and the remaining 5 were worth $300 per acre. There is also evidence that the single improvement, consisting of a 10,000-bushel grain bin along with associated equipment, was 9 years old and that the equipment had deteriorated to such a point that it had become inoperable. There is uncontested evidence that the actual value of the bin and equipment does not exceed $7,459.

The assessor, Mary Gruber, testified that she followed the Nebraska Agricultural Land Valuation Manual prepared by the Nebraska Department of Revenue; that she had no discretion to depart from the valuations established by the manual for various classifications of ground without Department of Revenue approval; and that she had made no inquiry as to the earnings produced by the subject farm. As county assessor she has access to information on all sales of real estate in the county and is familiar with comparable sales, and opined, without objection, that the taxed value of the subject property "does not exceed the fair market value" and is "just lower than market value." She testified that as the farm in its entirety is used as irrigated farmland she necessarily classified it as such, classifications being based on the use of the land. She further testified, however, that there is a classification for wasteland, that some land in the county is so classified, and that if plaintiff were using the 15 acres in question differently they would be assessed differently.

It does appear, as plaintiff argues, that the Gosper County assessor may not be entirely clear as to the factors she must consider and the proper role information supplied by the Department of Revenue plays in her duty to assess property. We do not know what the Legislature had in mind when it included "property tax laws" in the listing of items it characterizes as "guides" in § 77-1330(1), other than instructing the Tax Commissioner to keep assessors

advised annually with information as to current property tax laws. It is necessarily the fact, however, that all things except constitutionally valid property tax laws are no more than guidelines to be employed in arriving at an ultimate assessment against a particular taxable unit which meets the constitutional and statutory requirements that property be taxed uniformly and proportionately, at an amount which does not exceed actual value. As we have said in the past, authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value. They are required to use methods and to consider such relevant factors as result in a proper assessment. *Farmers Co-op Assn. v. Boone County, ante* p. 763, 332 N.W.2d 32 (1983); *Potts v. Board of Equalization, ante* p. 37, 328 N.W.2d 175 (1982); *Lincoln Tel. & Tel. Co. v. County Board of Equalization,* 209 Neb. 465, 308 N.W.2d 515 (1981); *Gradoville v. Board of Equalization,* 207 Neb. 615, 301 N.W.2d 62 (1981). In the absence of other evidence, proof that the guidelines provided by the Tax Commissioner were applied correctly raises a presumption that the assessment is legally proper. *Farmers Co-op Assn., supra.* Here, however, there is uncontradicted evidence which establishes that the 15 acres in question are misclassified, i.e., they are in fact wasteland but classified as irrigated farmland. Thus, even if the farm unit in question is assessed at less than market value, that part consisting of those 15 acres is not being assessed "uniformly and proportionately" to other similar land. A landowner is entitled to have his property assessed uniformly and proportionately with other property even though the result may be that it is assessed at less than actual value. *Konicek v. Board of Equalization,* 212 Neb. 648, 324 N.W.2d 815 (1982). Misclassifying property may result, as the evidence in this case establishes, in a lack of uniformity and proportionality. In such an event the taxpayer is entitled to relief.

We review an appeal from a board of equalization de novo as in an equitable proceeding. *Hastings Building Co. v. Board of Equalization,* 212 Neb. 847, 326 N.W.2d 670 (1982). Applying that standard, we find that the assessment in question should be reduced so as to reflect a value for the 15 acres in question of $2,500 and further reduced to reflect the value of the improvement to be $7,459.

We remand the case to the District Court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. CORNELIUS M. CHRISTENSEN, ALSO KNOWN AS DEAN CHRISTENSEN, APPELLANT.

331 N.W.2d 793

Filed March 25, 1983. No. 82-243.

1. **Sentences: Appeal and Error.** When a court considers a sentence for a convicted offender, it shall, among other things, consider the offender's delinquency and criminal history.
2. _____: _____. Absent an abuse of discretion, the sentence imposed by the trial court is to be affirmed.

Appeal from the District Court for Brown County: HENRY F. REIMER, Judge. Affirmed.

Tad D. Eickman, for appellant.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Defendant-appellant, Cornelius M. Christensen, also known as Dean Christensen, was found guilty upon his plea of such to a charge of third offense driving while under the influence of alcohol, in viola-

tion of Neb. Rev. Stat. § 39-669.07 (Reissue 1978). The offense took place January 29, 1982. The plea was entered and accepted on March 4, 1982, as the result of a plea bargain by which another pending charge of driving while intoxicated, third offense, would be dismissed, and yet another case of driving while intoxicated, in which appellant had been adjudged guilty, would proceed to sentencing. Pursuant to the plea and finding of guilt herein, appellant was sentenced to a term of not less than 20 months and not more than 5 years in the Nebraska Penal and Correctional Complex.

In this appeal appellant contends the trial court erred in refusing probation or a rehabilitative plan, thereby excessively sentencing him; and since the statute under which he was originally charged has been amended by 1982 Neb. Laws, L.B. 568, Neb. Rev. Stat. §§ 28-106 and 39-669.07 (Cum. Supp. 1982), to provide for a maximum period of confinement of 6 months, he should be released.

Defendant devotes portions of his brief and supplemental brief developing the proposition that this court has the power to reduce excessive sentences under the provisions of Neb. Rev. Stat. § 29-2308 (Reissue 1979). The power of this court to so do is not the question; the question is whether the sentence imposed is in fact so excessive as to warrant the exercise of this court's power to reduce it.

The record reveals defendant has a monumentally lengthy prior record, the bulk of which results from behavior related to drinking. It includes at least 10 drunken driving arrests; 5 other driving-related offenses; an aggravated assault, the disposition of which is unknown; and 3 drinking-related violations of probation. Defendant has been "treated" for alcoholism on four different occasions at three different institutions; yet reports from these institutions indicate no real interest or cooperation as regards his dependency on alcohol. In the face of that history, defendant's excessive sentence claim is

fatuous. A sentencing judge is required to have only an open mind, not an empty one. Neb. Rev. Stat. § 29-2260 (Reissue 1979) provides that when a court considers a sentence for a convicted offender, it shall, among other things, consider the offender's delinquency and criminal history. It is one of the most well-settled principles of law in this jurisdiction that there will be no modification of a sentence absent an abuse of discretion. Certainly there was no abuse of discretion by the sentencing judge herein such as worked to the defendant's detriment. Absent such an abuse, the sentence of the trial court is to be affirmed. *State v. Sims, ante* p. 708, 331 N.W.2d 255 (1983); *State v. Komor, ante* p. 376, 329 N.W.2d 120 (1983); *State v. Beckner,* 211 Neb. 442, 318 N.W.2d 889 (1982).

There remains for consideration defendant's urging that his sentence must be reduced in light of the passage of L.B. 568 subsequent to the event in question, relating to third offense drunk driving convictions. This issue was decided adversely to defendant in the supplemental opinions issued in *State v. Peiffer,* 212 Neb. 864, 326 N.W.2d 844 (1982), and *State v. Phillips,* 212 Neb. 875, 326 N.W.2d 849 (1982).

For the reasons set forth in the majority opinions therein, L.B. 568 does not apply to offenses committed prior to its effective date, July 17, 1982.

AFFIRMED.

NEBRASKA STATE BANK AND TRUST COMPANY OF BROKEN BOW, NEBRASKA, APPELLEE, V. LARON L. WRIGHT ET AL., APPELLEES, EMELIA PROROK, APPELLANT.

331 N.W.2d 535

Filed March 25, 1983. No. 82-246.

Judicial Sales. It is the general rule that confirmation of judicial sales rests largely within the discretion of the trial court, and will

not be reviewed except for manifest abuse of such discretion. The discretion to be exercised is not arbitrary, however, but should be one which is sound and equitable in view of all the circumstances. The court must act in the interest of fairness and prudence, and with a regard to the rights of all concerned, and the stability of judicial sales.

Appeal from the District Court for Custer County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Ross, Schroeder & Fritzler, for appellant.

Knapp, Mues, Anderson & Beavers, for appellee Bank.

Gregory G. Jensen, for amicus curiae County of Custer, County Attorney and County Sheriff.

KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Defendant Emelia Prorok appeals the confirmation of a land foreclosure sale, claiming the judge abused his discretion in setting aside the first sale.

On April 15, 1980, plaintiff, Nebraska State Bank and Trust Company of Broken Bow, Nebraska (Bank), was awarded a decree of foreclosure of its blanket $341,696.88 mortgage on separate tracts of land. We are concerned here with one tract, Lots 14, 15, and 16, Block 13, J. P. Gandy's Addition to Broken Bow, Custer County, Nebraska (hereinafter referred to as Tract X). These lien priorities were established: First lien, First Federal Savings and Loan Association of Lincoln (First Federal), on an unforeclosed mortgage, $24,698.58; second lien, defendants Hosticks, on a foreclosed mortgage, $5,339.32; third lien, Bank, allocated at $12,035.98; fourth lien, Prorok, $9,558. The decree provided that in the event of a sale, Tract X was to be sold subject to First Federal's mortgage. On February 9, 1981, an order of sale was issued directing the sale of Tract X subject to First Federal's mortgage. The sheriff's published notice of sale made no reference

to First Federal's mortgage. At the sale, Tract X was sold to Bank for $45,500. Bank's motion to confirm the sale was conditioned that the court order the payment of First Federal's mortgage out of the sale proceeds, otherwise to set the sale aside, claiming the sheriff made misleading statements during the sale concerning the liens due on the land. First Federal objected to the confirmation of the sale. On April 23, 1981, hearing was had on these motions, and the sale was set aside. Prorok filed her motion for new trial. Thereafter, two other public sales were ordered and set aside, on bids of $10,100 and $12,001. On January 8, 1982, the last sale was ordered, notice published, and the sale had, following which the sale was confirmed in Burdette Christensen for the bid price of $19,000. Prorok objected to the confirmation, or in the alternative moved the court to readjust the lien priorities. Prorok filed a motion for new trial. Both of Prorok's motions for new trial were denied. This appeal follows. We affirm.

Prorok's assigned errors focus on her claim that the judge abused his discretion in setting aside the first sale. If the first sale had been confirmed in the sum of $45,500, she might have realized satisfaction of her lien.

At the first confirmation hearing two affidavits, exhibits 2 and 3, were marked and offered in evidence; they were later filed in the court file. Exhibit 2 was the affidavit of Sheriff Neal Fink showing that, during the sale, inquiry was made by Carl Norden (bidding for Bank) as to "whether the property was being sold subject to any liens of record." Fink consulted with the county attorney and, as stated in his affidavit, "returned and informed the bidders . . . that the bidding would be subject to all liens of record." According to his affidavit, more bidder inquiries were made concerning the terms of the sale, and Fink, after again consulting with the county attorney, "informed all bidders that the prop-

erty would be sold subject only to taxes of record and it would not be subject to any current liens of record."

Exhibit 3 was the affidavit of Carl Norden, an officer of and bidder for Bank. He inquired of the sheriff as to the terms of the sale, and stated in his affidavit that "after much duration and debate the Sheriff, Neal Fink, at open sale, informed all the bidders that the property was being sold subject only to taxes of record and that all liens of record would be foreclosed and, further, the purchaser would take clear title to said property." Affiant stated that he would not have bid as he did if he had known the sale was subject to First Federal's lien.

The evidence and the journal entry in the court file show that the trial court considered the affidavits, the special sale provisions included in the decree, the rights of the purchaser, and the equities of all parties. The court found that the sheriff made inadvertent, erroneous statements concerning the terms of sale, that Norden had no knowledge of the decree terms and he was not at fault in relying on the sheriff's statements as to the sale terms, and the equitable solution was to order a resale of the property.

Appellant's assigned errors 1 and 4 urge that the two affidavits could not be considered by the court. An affidavit may be used "upon a motion, and in any other case permitted by law." Neb. Rev. Stat. § 25-1244 (Reissue 1979). We have consistently held that in a judicial sale confirmation hearing, the trial court has broad discretion and authority in determining what evidence can be considered, including affidavits. See *Occidental Building & Loan Ass'n v. Beal,* 122 Neb. 40, 239 N.W. 202 (1931). The affidavits were properly considered by the court.

Assigned errors 2, 3, and 6 are considered together, as they urge that the first sale was properly conducted, Neb. Rev. Stat. § 25-1531 (Reissue 1979),

and that the buyer could not rely on the representations made by the county sheriff.

In *Fisher v. Minor,* 159 Neb. 247, 66 N.W.2d 557 (1954), we said a purchaser at a judicial sale is bound to examine the title and not rely upon statements made by the officer conducting the sale as to its condition. We also said, "The vacation of the sale or its confirmation is a judicial matter within the sole control of the court." *Id.* at 254, 66 N.W.2d at 561.

The applicable standard to apply here is stated in *Michelson v. Wagner,* 170 Neb. 28, 31, 101 N.W.2d 498, 501 (1960): " 'It is the general rule that confirmation of judicial sales rests largely within the discretion of the trial court, and will not be reviewed except for manifest abuse of such discretion. The discretion to be exercised is not arbitrary, however, but should be one which is sound and equitable in view of all the circumstances. The court must act in the interest of fairness and prudence, and with a regard to the rights of all concerned, and the stability of judicial sales.' " See, also, *Rupe v. Oldenburg,* 184 Neb. 229, 166 N.W.2d 417 (1969); *Kleeb v. Kleeb,* 210 Neb. 637, 316 N.W.2d 583 (1982).

In our de novo review we find that the foreclosure judgment provided that any sale of Tract X should be made subject to First Federal's lien, and the order of sale so provided; that the published notice of sale was contrary to the judgment, in that there was no mention of First Federal's lien; that there were several bidders at the sale; that the bidders at the sale were concerned about the terms of the sale, and they asked direct questions about liens; that after consulting with the county attorney the sheriff announced untrue conditions of sale; that these statements were contrary to court orders, and related to facts basic to any informed bidder; that the first sale was not held in conformity to law; that Bank and its agent Norden should have known that

the sale was subject to First Federal's lien; and that Bank's bid of $45,500 was a mistake.

Generally, the concern of courts to preserve the stability of judicial sales deals with upset bids and the possibility of chilling the bidding. Here, the stability concerns an improper notice of sale and erroneous statements made by the court's agent in conducting the sale, and it was the overriding duty of the court to do equity to all the parties.

Considering the whole record we cannot say that the court abused its discretion in setting the first sale aside. The other error has no merit. The final sale is confirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIS B. BROMWICH, APPELLANT.

331 N.W.2d 537

Filed March 25, 1983. No. 82-357.

1. **Criminal Law: Constitutional Law: Waiver.** The accused may waive his right of confrontation, and the waiver of this right may be accomplished by the accused's counsel as a matter of trial tactics or strategy.
2. _____: _____: _____. Counsel in a criminal case may waive his client's fourteenth amendment right of the U.S. Constitution of confrontation by stipulating to the admission of evidence as a legitimate trial tactic.
3. **Rules of Evidence.** Neb. Rev. Stat. § 27-401 (Reissue 1979) defines relevance as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
4. **Criminal Law: Evidence.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

5. **Evidence: Appeal and Error.** The admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant.
6. **Judgments: Appeal and Error.** It is well settled that the judgment of the District Court is presumed correct, and the party assailing same has the burden of pointing out specifically the rulings of which he complains and the mistakes made by the court.
7. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion on the part of the trial court.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed.

Lynn B. Lamberty of Grimminger, Milner & Lamberty, for appellant.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

WHITE, J.

The defendant-appellant, Willis B. Bromwich, appeals from his conviction in the District Court on a charge of felony motor vehicle homicide under Neb. Rev. Stat. § 28-306(1) and (3) (Reissue 1979) and Neb. Rev. Stat. § 39-669.01 (Reissue 1979) for the death of Lyle D. Curley. The assignments of error are: (1) The trial court erred by trying the case on stipulated facts without first determining whether the appellant entered into the stipulation intelligently and voluntarily; (2) The trial court erred by disregarding the stipulated facts of counsel; (3) The trial court erred by admitting irrelevant evidence which prevented the appellant from receiving a fair trial; (4) The trial court erred by retaining in its possession letters from the family of the deceased prior to the determination of guilt without disclosing that fact to defense counsel; and (5) The trial court erred by imposing an excessive sentence. We affirm.

On August 30, 1981, at approximately 2:45 p.m.,

the appellant was southbound in his pickup truck on a gravel road in Holt County, Nebraska. The speed of the appellant's pickup was stipulated to be 60 to 62 miles per hour. Lyle Curley was in an eastbound automobile with four other passengers. The two roads upon which the two vehicles were traveling intersected, with stop signs for the north-south traffic. The appellant failed to stop at the stop sign and skidded 124 feet before colliding with the Curley vehicle. As a result of the collision Lyle Curley was killed and several of the passengers in the automobile were severely injured.

At the preliminary hearing the State put several expert witnesses on the stand and appellant's counsel conducted extensive cross-examination of each.

At a trial without a jury the parties stipulated that (1) the preliminary hearing transcript would be allowed as evidence at trial, (2) appellant was operating the pickup at the time of the accident, (3) the pickup was traveling at a speed of 60 to 62 miles per hour prior to impact or braking, (4) the pickup left 124 feet of skid marks and skidded through the stop sign at the intersection, and (5) the proximate cause of Lyle Curley's death was the collision.

In addition to the stipulated evidence the prosecution offered photos of the accident scene and a certified abstract of the appellant's past driving record. The photos were received and the abstract came in over an objection to its relevance. No other evidence was introduced by either side.

In this appeal the appellant asserts that counsel in a criminal case may not waive his client's fourteenth amendment right of the U.S. Constitution of confrontation by stipulating to the admission of evidence unless the trial court first determined that the defendant entered into the stipulation intelligently and voluntarily. As authority for his position the appellant cites *Barber v. Page,* 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968), and *Pointer v.*

Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), which hold that the right of confrontation and cross-examination is an essential and fundamental requirement for a fair trial.

This sixth amendment right of the U.S. Constitution of an accused to confront the witnesses against him is a fundamental right made obligatory on the states by the fourteenth amendment. *Dutton v. Evans,* 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970). However, it has been consistently held that the accused may waive his right of confrontation and that the waiver of this right may be accomplished by the accused's counsel as a matter of trial tactics or strategy. *United States v. Goldstein,* 532 F.2d 1305 (9th Cir. 1976), *cert. denied* 429 U.S. 960, 97 S. Ct. 384, 50 L. Ed. 2d 327.

Counsel in a criminal case may waive his client's fourteenth amendment right of confrontation by stipulating to the admission of evidence if the attorney's decision is a legitimate trial tactic and the defendant does not dissent from the decision. *United States v. Stephens,* 609 F.2d 230 (5th Cir. 1980).

The appellant in this case admitted to the truth of the stipulated facts in open court, and there is no evidence that he dissented from his attorney's decision to enter into the stipulations. It would also be difficult for us to find in hindsight that counsel's decision in this matter was not part of a prudent trial strategy or tactic. Counsel may very well have concluded that he was better off to try the case on the preliminary hearing testimony rather than parade further live expert witness testimony before the trial court which could have been augmented to a greater extent than in the preliminary hearing.

Appellant has analogized the waiver of confrontation right to the waiver of trial by jury by entering a guilty plea under *Boykin v. Alabama,* 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). The appellant urges this court to impose a duty upon our trial courts to question each defendant prior to the ac-

ceptance of stipulated evidence in order to insure that a waiver of the confrontation right is effected personally by an accused who is acting intelligently and knowledgeably. We are reluctant to place further procedure upon an already overburdened trial court. Carried to its logical conclusion, appellant's argument would require the trial court to instruct an accused every time counsel makes a decision not to cross-examine an adverse witness. On these facts we find no grounds for reversal.

Appellant's second assignment is that the trial court erred in disregarding the stipulated facts of counsel as to speed. While there is evidence in the record that the trial judge considered the 60 to 62 miles per hour to be a minimum speed rather than the exact speed as agreed to by the parties, he was perfectly justified in so doing because the parties also stipulated that the preliminary hearing testimony was admitted. At the preliminary hearing the State's expert in vehicle speed testified that the 60- to 62-miles-per-hour speed that he fixed for the appellant's vehicle was at the minimum range of possible speeds prior to impact or braking. Thus, it was more of a case of one stipulation supplementing another rather than the trial judge totally disregarding a stipulation of the parties. We therefore find that the court was entitled to take into consideration the additional testimony with regard to speed.

The appellant contends that the trial judge erred in admitting an abstract of the appellant's driving record. The abstract showed that appellant's license had been suspended prior to the collision, in addition to his past driving violations. Defense counsel objected on the ground that the exhibit was irrelevant to the charge.

Neb. Rev. Stat. § 27-401 (Reissue 1979) defines relevance as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence."

" 'Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.' " *State v. Classen,* 202 Neb. 324, 329, 275 N.W.2d 91, 94 (1979).

In the instant case it was error for the trial court to admit the abstract of the appellant's past driving record. The abstract had no probative value one way or the other as to whether the appellant drove his vehicle with indifferent or wanton disregard for the safety of persons or property on August 30, 1981. Rather, the abstract was more in the nature of evidence of other crimes or wrongs offered to prove the character of a person in order to show that he acted in conformity therewith.

However, the admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant or he is prejudiced from having a fair trial. *Classen, supra.* In the present case we would be hard pressed to find that the appellant was prejudiced by the admission of the abstract because of the ample amount of evidence remaining to substantiate the charge that he drove his vehicle with indifferent or wanton disregard for the safety of persons or property in violation of the statute.

The automobile driven by Lyle Curley was visible 642 feet north of the intersection protected by stop signs. The appellant failed to stop at the stop sign and left 124 feet of skid marks before colliding with the Curley vehicle while exceeding the speed limit. We therefore conclude that the trial court's allowance of the abstract into evidence did not prejudice the right of appellant to a fair trial.

We also find appellant's position that the trial court erred by retaining in its possession letters

from the family of the deceased prior to the determination of guilt without disclosing that fact to defense counsel to be untenable. Appellant makes a bare assertion without any showing of prejudice by the trial court.

It is well settled that the judgment of the District Court is presumed correct, and the party assailing same has the burden of pointing out specifically the rulings of which he complains and the mistakes made by the court. *Smith v. Damato,* 172 Neb. 811, 112 N.W.2d 21 (1961).

Trial judges are not required to sequester themselves from the media or private communication in the same manner as a juror might be. A judge does not become disqualified or prejudice the rights of an accused to a fair trial merely because someone sends him a letter.

After the trial judge pronounced the appellant guilty in this case, he properly informed defense counsel that he had received letters from the victim's family, permitted counsel to examine them, and directed that they be included in the presentence investigation. There is no evidence in the record that the trial court considered the letters in reaching its decision as to guilt or innocence.

Appellant also argues that his sentence is excessive. The trial court sentenced appellant to not more than 5 years nor less than 20 months and a fine of $10,000.

Appellant's first traffic violation occurred 1 month after his 16th birthday when he was charged and convicted of careless driving. Subsequently, appellant had two convictions for drag racing, six for speeding, two for reckless driving, two for having no driver's license on his person, and two for driving under a suspended license. Appellant was also driving on a suspended license at the time of the accident at issue in the case at bar, and had had six prior accidents, not including this one. The trial

court clearly did not abuse its authority in imposing the maximum sentence.

A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion on the part of the trial court. *State v. Parks,* 212 Neb. 635, 324 N.W.2d 673 (1982).

AFFIRMED.

LAVERNE R. LAUBSCHER ET AL., APPELLANTS AND CROSS-APPELLEES, V. SANITARY AND IMPROVEMENT DISTRICT NO. 20 OF SARPY COUNTY, NEBRASKA, APPELLEE AND CROSS-APPELLANT.

331 N.W.2d 542

Filed March 25, 1983. No. 82-505.

Administrative Hearings: Notice: Waiver. Where one appears before an administrative body and presents evidence or makes argument, the party so appearing cannot thereafter claim a denial of due process solely on the ground that proper notice of the hearing was not given. After appearing at the hearing the party is deemed to have waived any objection with regard to notice.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Reversed and remanded for further proceedings.

Jay L. Welch, for appellants.

P. F. Render, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

This is an inverse condemnation action brought by the plaintiff property owners against the defendant sanitary and improvement district to recover damages for an alleged taking and damaging of plaintiffs' property resulting from the wrongful construction of a concrete flume without having brought condemnation proceedings or paying compensation.

The District Court determined that there was error in the proceedings because of a failure to comply with Neb. Rev. Stat. § 76-706 (Reissue 1981), and remanded the matter to the county court for further proceedings, with orders that the petition of plaintiffs be adjudged as being filed as of the date of remand at no additional costs to plaintiffs. The plaintiffs have appealed to this court and the defendant has cross-appealed. We reverse.

The record discloses that on February 1, 1982, plaintiffs filed a petition with the county judge of Sarpy County, Nebraska, against Sanitary and Improvement District No. 20 of Sarpy County, Nebraska, alleging that the district had taken and damaged plaintiffs' property by the construction of a concrete flume in 1980 without having instituted condemnation proceedings, and without payment of compensation.

On March 3, 1982, the county judge entered its order appointing three appraisers to appraise the damage to plaintiffs' land. On the same date the county judge issued a notice to condemnor and condemnees, informing the parties that a petition had been filed and that appraisers had been appointed and would qualify and take their oath as required by law on March 30, 1982, at 9 a.m., and proceed to the site for the purpose of inspecting and viewing the property and assessing the damages. The notice also stated that the appraisers would thereafter meet "at the County Courtroom of Sarpy County, Nebraska at the hour of ____ o'clock ____ .M., on the ____ day of ____, 1982 and receive whatever evidence may be submitted on the matter of damages sustained by the condemnees."

On March 5, 1982, the sheriff served the notice on Robert Meisinger, clerk of the defendant S.I.D., and Melvin Gilsdorf, chairman of the defendant S.I.D., by leaving copies at the "usual place of residence" of each of the individuals.

On March 26, 1982, the defendant filed a document

entitled "Special Appearance" for the purpose of contesting jurisdiction over the person of the defendant. The grounds for the "special appearance" were that the appraisers were not appointed within 3 days from the filing of the petition as required by law; that notice of the time and place of meeting of the board of appraisers to have the damages assessed had not been served upon the defendant; and that the notice was not served upon the defendant in accordance with Nebraska law.

On March 30, 1982, the appraisers were sworn, and they inspected and viewed the premises and heard the evidence and arguments of *all* parties, including the defendant, as to the amount of damages sustained. Thereafter, the appraisers assessed damages against the defendant in the sum of $4,985, and filed their return in the county court on April 9, 1982. The defendant appealed to the District Court.

On June 4, 1982, the defendant filed a motion in the District Court to vacate the return of the appraisers in the county court. The grounds were the same grounds set forth in the "special appearance" of defendant in the county court.

The position of the defendant is that because the county court failed to appoint appraisers within 3 days after the petition was filed and the notice of the proceedings was not served on the defendant in strict accordance with all the requirements of § 76-706, the entire proceedings in the county court were null and void. The defendant makes this claim notwithstanding the fact that it appeared at the proceedings before the board of appraisers, presented evidence, and made argument to the appraisers.

The single question presented by the appeal, then, is whether one who appears at an administrative hearing, gives testimony, and makes argument can thereafter claim the proceeding to be void because the party appearing did not receive advance notice of the hearing. In *Watkins v. Dodson,* 159 Neb. 745, 754, 68 N.W.2d 508, 514 (1955), we said: "Due proc-

ess of law in the most comprehensive sense implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved." In the instant case the defendant was afforded every opportunity which more formal notice would have granted to it before the board of appraisers. It was aware of the hearing and in fact appeared. It presented evidence and made argument and, most important of all, it was still afforded the opportunity of appealing the decision of the board of appraisers to the District Court where the proceedings would be de novo. See Neb. Rev. Stat. §§ 76-715 to 76-717 (Reissue 1981). The defendant has failed to show us how it was denied due process of law under the factual circumstances in this case. Where one appears before an administrative body and presents evidence or makes argument, the party so appearing cannot thereafter claim a denial of due process solely on the ground that proper notice of the hearing was not given. After appearing at the hearing the party is deemed to have waived any objection with regard to the matter of notice.

The action of the District Court in remanding the proceedings to the county court for further proceedings was erroneous. The order of June 22, 1982, is vacated and the case remanded for further proceedings in the District Court.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEVEN E. STUART, APPELLANT, V. OMAHA PORKERS, INC., ET AL., APPELLEES.

331 N.W.2d 544

Filed March 25, 1983. No. 82-577.

1. **Employment Security Law: Appeal and Error.** This court reviews cases regarding unemployment benefits de novo on the record and will retry all issues of fact and reach an independent conclusion.
2. **Employment Security Law: Words and Phrases.** While the term "misconduct" is not specifically defined in Neb. Rev. Stat. § 48-628(b) (Reissue 1978), it has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Larry R. Spain, for appellant.

Pamela A. Mattson, for appellee Commissioner of Labor.

Roger J. Miller and Dale E. Bock of Nelson & Harding, for appellee Omaha Porkers.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ.

WHITE, J.

This is an appeal from a decision of the District Court for Douglas County, Nebraska, which affirmed the decision of the Nebraska Appeal Tribunal of the Department of Labor disqualifying claimant, Steven E. Stuart, from receiving unemployment benefits for a period of 7 weeks. The tribunal found that the claimant had been discharged for misconduct connected with his work.

This court reviews cases regarding unemployment benefits de novo on the record and will retry all

issues of fact and reach an independent conclusion. Neb. Rev. Stat. § 48-640 (Reissue 1978); *Heimsoth v. Kellwood Co.*, 211 Neb. 167, 318 N.W.2d 1 (1982).

The appellant, Steven E. Stuart, was employed as a packinghouse laborer by appellee Omaha Porkers, Inc., until he was discharged on November 23, 1981. At the time Stuart commenced his employment with Omaha Porkers, he, as well as all other new employees, was informed of a company rule that 3 days' absence without a notification to the company of such intended absence would result in automatic termination.

Stuart had been injured while working at the plant on September 25, 1981, and was released by his physician to return to work on November 13, 1981, a Friday. Stuart worked November 13 and again on November 16, 1981. On November 17, 1981, Stuart called in and notified the company representative that he did not intend to work on that day. He did so again on November 18, 1981. The reason given was "chronic and persistent pain." He did not indicate the length of his absence. On November 19, 1981, Stuart contacted the company's workmen's compensation insurance carrier in order to arrange a medical examination. He spoke to Nancy Heaton concerning the company rule that he notify the company, and was assured that she would take care of it. It appears Heaton did speak with the company representative. However, Stuart did not notify the employer on any subsequent date and he was discharged on November 23, 1981.

Neb. Rev. Stat. § 48-628(b) (Reissue 1978) of the Nebraska Employment Security Law provides that an individual shall be disqualified for benefits "[f]or the week in which he has been discharged for misconduct connected with his work, if so found by the commissioner, and for not less than seven weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner in each

case according to the seriousness of the misconduct . . . ."

While the term "misconduct" is not specifically defined in the statute, it has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations. *Snyder Industries, Inc. v. Otto,* 212 Neb. 40, 321 N.W.2d 77 (1982); *Bristol v. Hanlon,* 210 Neb. 37, 312 N.W.2d 694 (1981).

Stuart admitted on cross-examination that he was completely familiar with the company work rules and that he had been warned with respect to his absenteeism. Regardless of whether the notification to Nancy Heaton of his absence of November 19, 1981, was sufficient to show the absence of misconduct on that date, the continued failure to notify the company on subsequent dates was a clear violation of the company's rule. In common experience, the presence of or at least the preshift notice of absence of a workman is essential to the efficient operation of an assembly line production system and is a legitimate interest of the employer. The absence without notice, taken with previous warning, was sufficient to find that Stuart was discharged for willful misconduct. *Strauss v. Square D Co.,* 201 Neb. 571, 270 N.W.2d 917 (1978).

The judgment of the District Court affirming the decision of the appeal tribunal was correct and is hereby affirmed.

AFFIRMED.

GAYLE MCCAUL ET AL., APPELLANTS AND CROSS-APPELLEES, V. AMERICAN SAVINGS COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.

L & M RENTALS, A NEBRASKA PARTNERSHIP, APPELLANT AND CROSS-APPELLEE, V. AMERICAN SAVINGS COMPANY, A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT.

STREAMLINE, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. AMERICAN SAVINGS COMPANY, A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT.

T-B CONSTRUCTION, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. AMERICAN SAVINGS COMPANY, A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT.

TREND 100, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. AMERICAN SAVINGS COMPANY, A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT.

331 N.W.2d 795

Filed April 1, 1983. Nos. 81-812, 82-100, 82-134, 82-160, 82-161.

1. **Installment Loans.** The exemptions specified in Neb. Rev. Stat. § 45-101.04(2), (3), and (4) (Reissue 1978) exempt the specified transactions from the installment loan act, Neb. Rev. Stat. §§ 8-435 et seq. (Reissue 1977), as well as from the interest rate limitations of § 45-101.03.
2. _____. Under the provisions of Neb. Rev. Stat. § 59-1617 (Reissue 1978) an installment loan by an industrial loan and investment company, regulated by the Nebraska Department of Banking and Finance, is exempt from the Consumer Protection Act, §§ 59-1601 et seq.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

W. Eric Wood of Dwyer, O'Leary & Martin, P.C., for appellants.

James B. Cavanagh of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellee American Savings.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

MCCOWN, J.

The plaintiffs, McCaul et al., stockholders of Westmont Enterprises, Inc., and guarantors of a promissory note from Westmont to defendant American Savings Company, sought to enjoin American Savings Company from selling real property pursuant to a trust deed executed in conjunction with a loan to Westmont. American Savings Company counterclaimed and cross-claimed, praying that Westmont be found to be in default on the loan, that judgment for American be entered, and that the sale of the property be authorized. The District Court dismissed the plaintiffs' petition and entered judgment in favor of American Savings Company against Westmont and the plaintiffs, and ordered sale of the property. The plaintiffs have appealed.

Four additional cases brought against American Savings Company have been consolidated with the *McCaul* case on appeal. They involve various factual aspects of the same central issue, and an affirmance of the District Court judgment in the *McCaul* case will be decisive as to all the cases.

On October 23, 1978, the plaintiffs and Westmont Enterprises, Inc., entered into a loan agreement with American Savings Company, an industrial loan and investment company licensed under the provisions of Neb. Rev. Stat. §§ 8-401 et seq. (Reissue 1977).

On October 23, 1978, Westmont executed a promissory note to American in the principal sum of $176,375.69, with interest at 12 percent per annum. The plaintiffs were guarantors of the promissory note. The terms of the loan agreement also included the payment of a $5,000 fee by Westmont to American as a "service charge" and the assignment of four life insurance policies to be issued on the lives of the individual plaintiffs as collateral. As

principal security for the loan, Westmont executed a first trust deed to American on real property owned by Westmont.

Westmont failed to pay the installment of principal and interest due on December 1, 1979, or any payments thereafter. American declared a default and accelerated the entire debt.

In addition to failure to pay principal and interest when due, Westmont was also in default for failure to pay taxes and assessments, failure to preserve and maintain the property, and in allowing a receiver to be appointed over the business of Westmont. American gave notice that the property would be sold at public auction under the terms of the trust deed. The plaintiffs then brought this action seeking to enjoin the sale on the ground that the loan was in violation of the industrial installment loan act and the Consumer Protection Act, and a temporary restraining order was granted.

American filed a counterclaim and cross-claim, praying that the court find Westmont in default on the promissory note and loan, enter judgment for American, and authorize sale of the property.

Following trial on August 4, 1981, the District Court held that the loan by American to Westmont was not subject to the industrial installment loan act, Neb. Rev. Stat. §§ 8-435 et seq. (Reissue 1977), and was also exempt from the Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1978). The court dissolved the temporary restraining order, dismissed plaintiffs' petitions, and entered judgment for American Savings Company against Westmont and the plaintiffs in the amount of $231,766.84, which included principal and interest to the date of the judgment on October 21, 1981. The plaintiffs have appealed.

Judgments for American Savings Company were also entered in each of the four consolidated cases and in each of them the plaintiffs have appealed.

The plaintiffs contend that the loan from Ameri-

can to Westmont is in violation of the installment loan act, §§ 8-435 et seq., and is not exempt from that act under any of the subsections of Neb. Rev. Stat. § 45-101.04 (Reissue 1978).

At the time American made the loan to Westmont which is involved here, Neb. Rev. Stat. § 45-101.03 (Reissue 1978) provided: "Except as provided in section 45-101.04, any rate of interest which may be agreed upon, not exceeding eleven per cent per annum on the unpaid principal balance, shall be valid upon any loan or forbearance of money, goods, or things in action and may be taken yearly, for any shorter period, or in advance, if so expressly agreed."

At the same time, § 45-101.04 provided in part: "The limitation on the rate of interest provided in section 45-101.03 shall not apply to:

"(1) Loans made by any licensee or permittee operating under a license or permit duly issued by the Department of Banking and Finance pursuant to sections 8-319, 8-401 to 8-417, 8-815 to 8-823, 8-825 to 8-829, 21-1760 to 21-1764, 21-1766 to 21-1796, 21-1799 to 21-17,108, 21-17,110 to 21-17,119, 45-114, 45-116 to 45-140, or 45-142 to 45-155;

"(2) Loans made to any corporation, partnership, or trust;

"(3) The guarantor or surety of any loan to a corporation, partnership, or trust;

"(4) Loans made when the principal amount of the indebtedness is one hundred thousand dollars or more." Sections 8-401 to 8-417 refer to industrial loan and investment companies and American is such a licensee.

Subsection (1) of § 45-101.04 exempts loans made by specific *lenders* from general maximum interest limitations when they are operating in compliance with a license or permit duly issued by the Department of Banking and Finance which authorizes specialized interest rate ceilings above the general maximum. The remaining subsections of § 45-101.04

exempt various specified *transactions* from all state interest rate ceilings.

The plaintiffs contend that if a lender is exempt from general usury limits under subsection (1) of § 45-101.04 as to loans made within the terms of its license authority, the remaining transactional exemptions do not apply to licensees. The argument is that although any unlicensed lender would be able to enter into any of the loan transactions specified in subsections (2) et seq. of § 45-101.04, free of the limitations of general and special usury laws, a licensed lender would still be subject to all the limitations applicable to lenders as to loans made under the specific authorization of the licensing law.

Most entities which regularly lend money in Nebraska are regulated by the Department of Banking and Finance and hold a license or permit to make specified types of loans under statutory terms and specified interest rates. Virtually all of such lenders have loans which are made within general usury limits, others which are made under special license limits, and still other loans which are exempt from both general and special usury statutes. To hold that the transactional exemptions of §§ 45-101.04(2) et seq. do not apply to licensees or permittees but only to nonlicensees would render the statute virtually meaningless.

In *Gruenemeier v. Commonwealth Co.*, 178 Neb. 66, 131 N.W.2d 713 (1964), we held that the industrial loan and investment company act did not impinge upon the general powers of loan and investment companies to make loans which were otherwise valid and legal loans in the absence of the act. We held that the authority to make loans under the act constituted an additional grant of power, but did not affect the power to make loans which were not in violation of the general usury law. In that case, with respect to loan transactions by a licensee which would have been valid and legal under the general usury statutes, we said: "An industrial loan and in-

vestment company stands in the same position as a nonlicensee." *Id.* at 73, 131 N.W.2d at 717. See, also, *Albers v. Overland Nat. Bank,* 212 Neb. 578, 324 N.W.2d 396 (1982).

The evidence in the present cases is undisputed that the Department of Banking and Finance, charged with the duty of enforcing the provisions of §§ 8-435 et seq., has consistently taken the position that the loan transactions specified in subsections (2), (3), and (4) of § 45-101.04 are exempt from the provisions of §§ 8-435 et seq. Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction, particularly when the Legislature has failed to take any action to change such an interpretation. See *Seldin v. Northland Mortgage Co.,* 189 Neb 175, 202 N.W.2d 174 (1972).

The exemptions specified in § 45-101.04(2), (3), and (4) exempt the specified transactions from the installment loan act, §§ 8-435 et seq., as well as from the interest rate limitations of § 45-101.03.

The plaintiffs also contend that the conduct of American Savings Company in making the loans involved here constituted an unfair trade practice in violation of the Nebraska Consumer Protection Act, §§ 59-1601 et seq.

Section 59-1617 provides in part: "Nothing in sections 59-1601 to 59-1622 shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the Director of Insurance, the Public Service Commission, the federal power commission or any other regulatory body or officer acting under statutory authority of this state or the United States . . . ."

In *Kuntzelman v. Avco Financial Services of Nebraska, Inc.,* 206 Neb. 130, 291 N.W.2d 705 (1980), we held that an installment loan made by a licensee under the installment loan act was a transaction permitted, prohibited, or regulated by a regulatory body acting under the statutory authority of the

state and was therefore exempt from the provisions of the Consumer Protection Act.

The records in the cases now before us establish that each of the loans involved here was reported to and at least indirectly approved by the Department of Banking and Finance. Under the provisions of § 59-1617 an installment loan by an industrial loan and investment company, regulated by the Nebraska Department of Banking and Finance, is exempt from the Consumer Protection Act, §§ 59-1601 et seq.

In view of the disposition made of the basic issues it is unnecessary to discuss the remaining assignments of error.

The judgment of the District Court in *McCaul* was correct and is affirmed. The judgment in that case is determinative of the issues in the remaining consolidated cases, and each of those judgments is affirmed.

AFFIRMED.

ALVIN H. STIGGE ET AL., APPELLANTS, V. MARGARET M. GRAVES, COUNTY SUPERINTENDENT, CUMING COUNTY, NEBRASKA, APPELLEE.

332 N.W.2d 49

Filed April 1, 1983. No. 81-838.

1. **Pleadings.** The character of a pleading is determined by its content, not by its caption.
2. **Appeal Bonds.** Where an appeal bond is given within the proper time, even if defective, the court has obtained jurisdiction, and the proper procedure is for the adverse party to move to compel the appellant to give a proper bond in an amount and conditioned as required by law.
3. _____. If the appellant fails to comply with an order requiring that a new or amended bond be furnished, the appeal may be dismissed.
4. _____. The filing of an appeal bond is a "proceeding" as used in Neb. Rev. Stat. §§ 25-852 and 25-853 (Reissue 1979), and the right to amend an appeal bond is within the purview of those sections.

Appeal from the District Court for Cuming County:

RICHARD P. GARDEN, Judge. Reversed and remanded with directions.

John M. Thor of Grady, Caskey & Thor, for appellants.

John D. Feller, Cuming County Attorney, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

MCCOWN, J.

The defendant county superintendent of schools entered an order dissolving a school district. The plaintiff landowners filed a petition on appeal in the District Court for Cuming County. The District Court sustained a demurrer to plaintiffs' petition on appeal on the ground that the court was without jurisdiction to hear the appeal, and dismissed the petition. This appeal followed.

On June 2, 1981, the defendant, Margaret Graves, superintendent of schools of Cuming County, entered an order dissolving school district No. 3 under the provisions of Neb. Rev. Stat. § 79-420 (Reissue 1981).

On June 11, 1981, the plaintiff landowners filed their petition in the District Court for Cuming County requesting an appellate review of the defendant's order. On the same day the plaintiffs deposited $50 cash in the District Court and also filed in the District Court (1) a copy of a notice of appeal addressed to the defendant superintendent notifying her that the plaintiffs intended to appeal to the District Court from her order of June 2; (2) a copy of a bond for appeal, signed on behalf of plaintiffs, undertaking to the defendant superintendent, in the sum of a $50 cash bond, conditioned that the plaintiffs would prosecute their appeal to effect and without unnecessary delay and that if judgment be adjudicated against them on appeal they would satisfy such judgment and costs; and (3) a copy of a praecipe for transcript addressed to the clerk of the

District Court and to the defendant superintendent requesting the preparation of a certified transcript of the proceedings undertaken by her, inclusive of all documents in her possession and filed relevant to the order.

In addition to filing the notice of appeal, appeal bond, and praecipe for transcript in the District Court, a duplicate copy of each of the three documents was delivered to the defendant personally on June 12, 1981, by the sheriff of Cuming County. Summons was also served on the defendant at the same time, notifying her that plaintiffs sought appellate review of her order of June 2, 1981, and an order of the District Court determining that the defendant had no legal authority to dissolve the school district, and declaring the order void and vacating it.

The defendant superintendent prepared and delivered a transcript which was filed in the District Court within 30 days, but the transcript did not contain copies of the praecipe for transcript, notice of appeal, or bond for appeal.

Thereafter, the defendant superintendent demurred to the plaintiffs' petition on the ground that the District Court did not have jurisdiction of the appeal.

On September 3, 1981, the District Court found that it did not have jurisdiction over the appeal because of a failure of plaintiffs to file a notice of appeal and bond for appeal as required by law, sustained the defendant's demurrer, and dismissed plaintiffs' petition.

On September 8, 1981, plaintiffs filed a motion for new trial and a motion for leave of court to amend the bond on appeal if the bond was found to be defective. On November 5, 1981, the District Court overruled plaintiffs' motion for a new trial but did not sustain or deny the motion for leave to amend the bond. Plaintiffs have appealed.

The defendant contends that the notice of appeal, the bond for appeal, and the praecipe for transcript

were not "filed" with her but were only delivered to or served on her. She also contends that the $50 cash deposit was made with the clerk of the District Court rather than with her and that she has never approved any surety on the bond for appeal. For these reasons she argues that plaintiffs have failed to comply with the statutory requirements for appeal and that the District Court did not acquire jurisdiction. It is undisputed that the documents were submitted within the statutory time and contained the statutorily defined provisions if they were properly "filed."

The statute under which the defendant acted in issuing the order of June 2, 1981, provides that appeals from the action of the county superintendent may be made to the District Court of the county of the official concerned, but provides no procedure. See § 79-420.

Neb. Rev. Stat. § 25-1937 (Reissue 1979) provides in part: "When the Legislature enacts a law providing for an appeal without providing the procedure therefor, the procedure for appeal to the district court shall be the same as for appeals from the county court to the district court in civil actions. Trial in the district court shall be de novo upon the issues made up by the pleadings in the district court."

The statutes governing appeals from county court to District Court in effect at the time of this proceeding were Neb. Rev. Stat. §§ 24-541 et seq. (Reissue 1979). Section 24-542 requires that the party appealing from a decree, judgment, or order of a county court shall, within 10 days of the rendition of judgment, file a notice of appeal with the county court, specifying the parties taking the appeal, and the decree, order, or judgment, or part thereof, appealed from.

Section 24-543 requires that the party appealing, within 10 days from the rendition of judgment, shall post a cash bond with the clerk of the court or enter into an undertaking to the adverse party, with at

least one good and sufficient surety to be approved by the court, in a sum not less than $50 in any case, nor less than the amount of the judgment and costs, conditioned that the appellant will prosecute his appeal to effect and without unnecessary delay, and that if judgment be adjudged against him on the appeal he will satisfy such judgment and costs.

Section 24-544 provides that the clerk of the county court shall make out a certified transcript of the proceeding, including the undertaking or cash taken for such appeal. The section requires the transcript to be filed with the clerk of the District Court within 30 days from the entry of judgment, and provides that filing of the transcript shall constitute filing of the appeal with the District Court.

Obviously, the appeal statutes referred to cannot be applied literally to a case such as the present one in which the order appealed from is not an order of any court. The matter is further complicated here by the fact that the defendant who entered the order appealed from is not only the issuer of the order but is also the adversary party defendant on the appeal.

In effect, the defendant contends that since she did not approve the surety on the appeal bond, the District Court could not acquire jurisdiction of the appeal. If the argument were valid, the adversary party, by failing to approve a surety on an appeal bond, could deprive the appealing party of a right of appeal and prevent the District Court from acquiring jurisdiction.

The appeal statutes are obviously intended to apply only to courts, and application to a factual situation such as the present one must be drawn by analogy. Some cases involving orders of superintendents of schools have interpreted the statutes by substituting the words "county superintendent" for the words "county court." See, *Cherry v. Lofgren,* 187 Neb. 133, 187 N.W.2d 652 (1971); *School Dist. of Wilbur v. Pracheil,* 180 Neb. 121, 141 N.W.2d 768 (1966).

The defendant does not contend that she failed to receive a duplicate copy of the notice of appeal and the bond on appeal with its undertaking addressed to her. She asserts only that plaintiffs failed to properly "file" the documents with her. The defendant's action in preparing and delivering a transcript of the proceedings which did not include the disputed documents established without dispute that she actually received the documents in her official capacity as county superintendent and acted upon some of them. Her failure to include the documents in the transcript should not be allowed to foreclose the plaintiffs' right to appeal.

The various documents were captioned "In the District Court of Cuming County." The contents of the documents, however, clearly indicate that they are addressed to the defendant and concern an appeal from her order as superintendent. The character of a pleading is determined by its content, not by its caption. See *Walkenhorst v. Apolius,* 172 Neb. 830, 112 N.W.2d 31 (1961).

This court has frequently held that where an appeal bond is given within the proper time, even if defective, the court has obtained jurisdiction, and the proper procedure is for the adverse party to move to compel the appellant to give a proper bond in an amount and conditioned as required by law. If the appellant fails to comply with an order requiring that a new or amended bond be furnished, the appeal may be dismissed. See, *Ballantyne Co. v. City of Omaha,* 173 Neb. 229, 113 N.W.2d 486 (1962); *In re Estate of Arnold,* 210 Neb. 528, 315 N.W.2d 642 (1982).

Neb. Rev. Stat. § 25-852 (Reissue 1979) provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the

amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment."

Neb. Rev. Stat. § 25-853 (Reissue 1979) provides: "The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

The filing of an appeal bond is a "proceeding" as used in the above statutes, and the right to amend an appeal bond is within the purview of both of the cited sections. See *Ballantyne Co. v. City of Omaha, supra.*

In the present case the evidence established that there was substantial performance of the statutory requirements for appeal and that the District Court acquired jurisdiction of the appeal. The judgment of the District Court is reversed and the cause remanded for further proceedings with directions to permit the amendment of the current bond on appeal or to permit the filing of a new bond on appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

A. ANN SCOTT, APPELLANT, V. ARTHUR R. LANGVARDT, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF WADE H. SCOTT, JR., DECEASED, ET AL., APPELLEES.
IN RE ESTATE OF WADE H. SCOTT, JR., DECEASED.
A. ANN SCOTT, APPELLANT, V. ARTHUR R. LANGVARDT, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF WADE H. SCOTT, JR., DECEASED, APPELLEE.

331 N.W.2d 799

Filed April 1, 1983. No. 81-847.

Subrogation. The doctrine of subrogation includes every instance in which one person pays a debt for which another is primarily liable and which in equity and good conscience should have been discharged by the latter, so long as the payment was made under compulsion or for the protection of some interest of the one making the payment and in discharge of an existing liability.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded with directions.

Joseph Ginsburg of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon, for appellant.

No appearance for appellee.

BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and BRODKEY, J., Retired.

WHITE, J.

This is an appeal by appellant, A. Ann Scott, the wife of Wade H. Scott, Jr., deceased, from an order of the District Court for Lancaster County, Nebraska, in the above consolidated cases, dismissing the claim against her husband's estate. We reverse with directions.

At the time of his death in October 1974 the deceased had a $30,000 retirement policy with Lincoln Mutual Life Insurance Company, of which Mrs. Scott was the beneficiary.

On May 28, 1974, the decedent purchased a liquor store from Lois Pasco and R. R. L. Enterprises, Inc. The price of the store was approximately $58,000

and was paid with one note of $28,450 signed by the decedent and A. Ann Scott, an additional note of $5,472 which was secured by second mortgages on property owned jointly by Ann and Wade Scott, and the balance in cash. The indebtedness to Lois Pasco and R. R. L. Enterprises was further secured by a perfected security agreement and financing statement.

After her husband's death Ann Scott continued to operate the liquor store upon the mistaken belief that she was now the owner. She paid off the store purchase debt to Lois Pasco with $27,707.85 of the retirement policy insurance proceeds and the remaining balance of $8,266.41 from the proceeds of a personal loan. Ann Scott brought this action to be subrogated to the lien Lois Pasco and R. R. L. Enterprises held on the liquor store.

The doctrine of subrogation includes every instance in which one person pays a debt for which another is primarily liable and which in equity and good conscience should have been discharged by the latter, so long as the payment was made under compulsion or for the protection of some interest of the one making the payment and in discharge of an existing liability. *Sheridan v. Dudden Implement, Inc.*, 174 Neb. 578, 119 N.W.2d 64 (1962).

" ' "The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case." '

. . . .

"Subrogation may be had where certain facts exist, or do not exist, which justify an equity court doing justice in the premises. However, presence or absence of comparable certain facts in other cases

does not necessarily become a criterion which requires granting or denial of subrogation. The essential element is that facts exist which require subrogation that justice be done." *Rapp v. Rapp,* 173 Neb. 136, 144-45, 112 N.W.2d 777, 782 (1962).

Under the circumstances as presented, we find that Ann Scott is entitled to be subrogated to the rights of Lois Pasco and R. R. L. Enterprises. She did not make any payments as a volunteer; rather, she paid in good faith as one with an obligation or liability on the debt and an interest in property affected by the debt. Ann was liable as a cosigner on the $28,450 note, and the $5,472 note was secured by a second mortgage on property in which she had an interest. The funds that were used to pay these debts were procured through Ann Scott from her insurance proceeds or the incurrence of additional personal liability in the form of a bank loan. The estate therefore would be unjustly enriched if it were able to keep Ann's money and pay it out for the benefit of creditors of the deceased.

In a case very similar to the instant case the debt of an insured was paid from the proceeds of his life insurance policy by his two sister-beneficiaries. In holding that the beneficiaries of the policy were subrogated to the creditor's claim against the estate of the insured, the court in *In re Stafford's Estate,* 278 A.D. 612, 101 N.Y.S.2d 904, 906 (1951), stated: "The Surrogate determined that the debt due to the bank was a primary obligation of the decedent and consequently became a debt against his estate. He held that the respondents have valid claims against the estate for the difference between what they received from the insurance company and the amount of decedent's debt. The relationship between the decedent and the bank was that of debtor and creditor and when decedent's note was paid from the policies involved, respondents became subrogated to the rights of the bank."

The fact that the liquor license and title to the

property were in the name of the deceased was competent evidence on which the District Court correctly held the Pasco debt to be a primary obligation against the decedent's estate. However, the District Court did not go further and hold that in equity and good conscience the debt should have been paid by the estate.

We therefore find that Ann Scott has been subrogated to the rights of Lois Pasco and R. R. L. Enterprises to the extent of $35,974.26, which was applied in payment of the decedent's notes which were a primary obligation of the decedent. The claim of Ann Scott is allowed against decedent's estate, with interest and costs.

Reversed and remanded for a decree to be issued in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MARY L. SCULLY, APPELLEE, V. DANIEL T. SCULLY, APPELLANT.

331 N.W.2d 801

Filed April 1, 1983. No. 81-890.

1. **Child Support.** This court does not have authority to reduce past due installments of child support. This is not to say, however, that it may not find in a proper case that a party is estopped from collecting installments accruing after some affirmative action which would ordinarily terminate future installments.
2. **Estoppel.** Equitable estoppel is based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there must be reliance in good faith upon statements or conduct of the party to be estopped and a change of position by the party claiming the estoppel to his injury, detriment, or prejudice.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Hal Bauer of Bauer, Galter & Geier, for appellant.

Douglas W. Marolf, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and SPRAGUE, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Daniel T. Scully, respondent-appellant, appeals an order denying his application to modify a child support judgment, claiming that he provided full support of the children during a period of attempted family reconciliation with petitioner-appellee, Mary L. Scully. We affirm.

The 1975 original decree provided in part: (1) Assignment of the family home to appellant; (2) An alimony award in favor of appellee in the amount of $265 per month ending in June 1983; (3) Award of custody of daughters Dianna, born November 19, 1962, and Dana, born December 15, 1963, to appellee; (4) Appellant ordered to provide medical and dental care and to pay child support for the two daughters in the sum of $150 per month for each child; and (5) Award of custody of son Daniel, born November 6, 1959, to appellant. Appellee moved to Iowa. All accrued alimony payments have been paid.

Appellant was current on all child support payments until April 1977 when appellee and the two daughters returned to appellant's home in Lincoln, Nebraska, after the parties had agreed to attempt a family reconciliation. Appellant discontinued child support payments. The parties did not marry. They lived together with the children until June 1980 when appellee and Dana left the home. Dianna remained in the home with appellant and appellant resumed payment of $150 a month child support for Dana. In March 1981 appellant received notice from the clerk of the District Court that he was in arrears for child support in the sum of $11,700. No proceedings were instituted to recover the delinquencies by either appellee, Neb. Rev. Stat. § 42-370 (Reissue

1978), or other authority, Neb. Rev. Stat. § 42-358 (Reissue 1978).

Appellant filed his application on April 3, 1981, alleging that during the period of attempted reconciliation "both of said children resided in Respondent's home and Respondent fully supported said minor children . . . ." The prayer was for an order finding that he had paid child support in kind by actual support of the children. Appellee's answer was a general denial. The trial court found: "The evidence is insufficient to find that Respondent is entitled to credit for child support payments during said period . . . ."

Appellant assigns a general claim of error. He argues equitable estoppel, accord and satisfaction, and acquiescence.

Giving the pleadings and the evidence a liberal interpretation, equitable estoppel was an issue. See, *Robbins v. National Life & Acc. Ins. Co.,* 182 Neb. 749, 157 N.W.2d 188 (1968); *Ruehle v. Ruehle,* 161 Neb. 691, 74 N.W.2d 689 (1956).

During the reconciliation period appellant was self-employed, earning about $65,000 annually, and appellee worked from September 1977 to June 1980, earning a total sum of $18,000. Both parties had separate bank accounts and contributed to the family living expenses. Appellee testified that all of her earnings, all $265 alimony payments, and all other contributions she received from appellant were spent for expenses of the five-member family, including food, clothing, household items, entertainment, health care, and beauty aids for herself and the two girls. She documented most expenditures by canceled checks totaling approximately $18,000. Appellant testified that he furnished the family home, including loan interest, taxes, repairs, insurance, and upkeep; that he gave appellee $70 or $80 a week for family groceries; that he provided family autos; and that he paid for clothing, entertainment, and medical and dental care for the children. None

of these expenditures were corroborated except as related to the house and groceries.

"Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments." *Ruehle v. Ruehle, supra* at 698, 74 N.W.2d at 693.

An exception to *Ruehle* was considered in *Smith v. Smith,* 201 Neb. 21, 28-29, 265 N.W.2d 855, 860 (1978), where we held: "This court does not have authority to reduce past-due installments of child support. This is not to say, however, that it may not find in a proper case that a party has equitably estopped herself from collecting installments accruing after some affirmative action which would ordinarily terminate future installments."

. . . .

". . . 'Equitable estoppel is based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there must be a reliance in good faith upon statements or conduct of the party to be estopped and a change of position by the party claiming the estoppel to his injury, detriment, or prejudice.' " The claimed estoppel in *Smith* involved an adoption proceeding.

Appellee's representations to appellant were her unexplained silence and inaction. When she returned to Lincoln, appellant told her that he would pay all the bills. There was never any further agreement or discussion between the parties concerning either payment, nonpayment, waiver, substitute payments, or satisfaction of child support obligations. Appellant immediately discontinued payments. Appellee made no objection or demand for the same, and she took no affirmative court action to recover on the judgment. Her silence and inaction

are not explained in the record, and it is not for courts to speculate or supply answers, under these and similar circumstances, where general rules cannot be formulated. See 47 A.L.R.3d 1031 (1973).

There were no inducements here upon which appellant in good faith could rely. His proof of change of position and prejudice is also less than convincing. Some of his family expenditures did increase during this period, since they were made for five persons in an effort to make the attempted reconciliation succeed. At the same time, appellee contributed all of her funds toward the support of the same five persons. Certainly this was not in keeping with appellant's representation that he would pay all the bills.

Appellant's relief was to utilize the available forum and procedures. *Ferry v. Ferry,* 201 Neb. 595, 271 N.W.2d 450 (1978). The District Court order should be affirmed. There is no merit for appellant's claim of accord and satisfaction and acquiescence.

AFFIRMED.

SWEEP LEFT, INC., A NEBRASKA CORPORATION, APPELLANT, V. DARM CORPORATION, A NEBRASKA CORPORATION, APPELLEE.

331 N.W.2d 546

Filed April 1, 1983. No. 82-071.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Michael O. Johanns of Peterson, Bowman & Johanns, for appellant.

J. David Thurber of the Law Offices of John R. Doyle, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

The court, having reviewed the record de novo, finds that the decree of the District Court is supported by sufficient competent evidence and there is no error of law.

AFFIRMED.

LINCOLN WELDING SUPPLY CO., APPELLEE, V. INHALATION PLASTICS, INC., APPELLANT.

331 N.W.2d 804

Filed April 1, 1983. No. 82-080.

1. **Default Judgments.** The vacating of a default judgment rests in the sound discretion of the trial court, but such discretion is not an arbitrary one and must be exercised reasonably.
2. **Default Judgments: Appeal and Error.** The determination of whether there has been an abuse of discretion by the trial court in failing to set aside a default judgment must be made in light of the facts and circumstances of each case.
3. _____: _____. Among the factors to be considered in determining whether there has been an abuse of discretion in refusing to set aside a default judgment are those of the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceedings in the administration of justice.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Rollin R. Bailey of Bailey, Polsky, Cada & Todd, for appellee.

BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Inhalation Plastics, Inc., defendant-appellant, appeals from a default judgment entered in favor of plaintiff-appellee, Lincoln Welding Supply Co., in the sum of $27,774 on October 7, 1981.

Inhalation Plastics urges that the trial court erred in entering the default judgment and abused its discretion in refusing to set it aside. We cannot agree, and affirm the judgment of the trial court.

Lincoln Welding is a Lincoln, Nebraska, business which, among other things, supplied medical gases and associated equipment to hospitals for use in respiratory or inhalation therapy. Inhalation Plastics is an Illinois corporation with its principal place of business in Chicago. At the relevant time it engaged in the manufacture and sale of various medical and hospital products, including an oxygen humidifier known as Ster-O_2-Mist. This lawsuit for damages originated in connection with the purchase by Lincoln Welding from Inhalation Plastics of the Ster-O_2-Mist. The suit was initiated sometime in October of 1977; the briefs of the parties disagree as to the date of filing and the clerk's date stamp on the transcript copy of the original petition is not readable.

The first pleading on behalf of Inhalation Plastics contained in the transcript is a motion for enlargement of its time within which to answer certain discovery requests. That pleading was filed by a member of the Nebraska bar who was granted leave to withdraw from his representation of Inhalation Plastics on March 20, 1981. Although there are a number of references in various notices and pleadings to a Chicago, Illinois, law firm as representing Inhalation Plastics, after the withdrawal of Nebraska counsel, no pleadings bearing any Illinois attorney's signature were filed until after the default judgment had been entered. The record reveals a history of delays by Inhalation Plastics in responding to Lincoln Welding's various and numerous discovery re-

quests and a variety of efforts on the part of Lincoln Welding to secure compliance with the court's numerous orders relating thereto. The record reveals as well that the plaintiff amended its documents a number of times. This matter was finally resolved on the basis of a third amended petition filed on March 20, 1981.

The relevant history includes an order directing the defendant to answer certain interrogatories on or before May 1, 1981, or "default judgment to be entered." Although the record before us does not show what service, if any, was made of that order, a subsequent order was entered on May 11, 1981, directing Inhalation Plastics to show cause on June 15, 1981, why default judgment should not be entered against it. In accordance with the trial court's directions, a copy of that order was served by certified mail upon Inhalation Plastics' president and upon the Chicago law firm previously mentioned. Inhalation Plastics did not appear as ordered; whereupon the trial court found it to be liable to Lincoln Welding. A hearing was scheduled for June 30, 1981, to determine the amount of that liability. Again, as directed by the trial court, a copy of the order finding liability and scheduling the further hearing was served by certified mail upon Inhalation Plastics' president and upon the Chicago law firm discussed above. Inhalation Plastics again failed to appear at the scheduled time on June 30, 1981. An evidentiary hearing was conducted at that time, which included the testimony of an associate professor of finance with experience in projecting business earnings; he testified concerning Lincoln Welding's losses as a consequence of the breach of its warranties by Inhalation Plastics. The evidence, if believed by the trier of fact, supports a finding that Lincoln Welding suffered losses in the amount of the default judgment.

Inhalation Plastics filed a motion on December 11, 1981, to vacate and set aside the judgment. At the

hearing thereon the trial court received a number of affidavits offered by Inhalation Plastics which purport to establish that its Chicago attorney misrepresented the facts as to the conduct, status, and progress of the case and had assured it that its interests were being protected. The Chicago attorney's affidavit also recites that his conduct was caused by severe mental problems, which he sought to overcome through psychiatric care. One of Inhalation Plastics' affidavits contains assertions which tend to establish that Inhalation Plastics had a meritorious defense to Lincoln Welding's action. Lincoln Welding points out, however, that there is a lack of evidence to establish that Chicago counsel was incapable either mentally or physically to carry out the legal matters involved in this case and that he appears to have continued to practice law throughout the period of time involved.

Vacca v. DeJardine, ante p. 736, 331 N.W.2d 516 (1983), contains the most recent restatement of the rule that the vacating of a default judgment rests in the sound discretion of the trial court, but such discretion is not an arbitrary one and must be exercised reasonably. We held therein that it was an abuse of discretion to grant a default judgment in the absence of a prior order to show cause why such should not be done because of the failure to serve answers to certain discovery requests. We also held it was an abuse of discretion to set aside a default judgment where no answer had ever been filed, because a party seeking to vacate a default judgment must tender an answer or other proof disclosing a meritorious defense.

A determination of whether there has been an abuse of discretion by the trial court in failing to set aside a default judgment must of course be made in light of the facts and circumstances of each case. The facts of this case are not the facts of *Vacca, supra.* Although there was a showing of a meritorious defense in the instant matter, the entry of the

default judgments had each been preceded by an order to show cause why such should not be done. Those orders were ignored by Inhalation Plastics.

In *Michaelis v. Michaelis,* 187 Neb. 350, 190 N.W.2d 783 (1971), it was said that among the factors to be considered in determining whether there has been an abuse of discretion in refusing to set aside a default judgment are those of the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceedings in the administration of justice. In light of those factors it cannot be said there was any abuse of discretion by the trial court's refusal to set aside the default judgment in this case. The defendant waited fully 2 months and 4 days before moving to vacate the damage default judgment. Further, nearly 6 months elapsed between the finding of liability and the filing of the motion to vacate.

Inhalation Plastics seeks to hide behind the conduct of its Chicago attorney. The record, however, allows a clear inference that Inhalation Plastics, through its president, either knew or should have known that something was sorely amiss in the conduct of this case.

Inhalation Plastics cites a number of cases in which this court reversed a denial of a motion to vacate a default judgment. However, those cases are readily distinguishable on the facts from the instant situation. *Lacey v. Citizens Lumber & Supply Co.,* 124 Neb. 813, 248 N.W. 378 (1933), presented a situation wherein the defendants had no knowledge of the default proceedings. In *Beren Corp. v. Spader,* 198 Neb. 677, 255 N.W.2d 247 (1977), neither the defendants nor their attorneys were aware of the plaintiff's intention to take a default judgment. In *Coates v. O'Connor,* 102 Neb. 602, 168 N.W. 102 (1918), the opinion notes that some allegations in the petition of the plaintiff were indisputably false, the debt on which judgment was had was in fact not owed by the

defendant therein, and, further, the plaintiff had traveled to a foreign jurisdiction so as to surreptitiously attach and sell the property of the defendant without his knowledge. Those are not the facts of the present case. *Beem v. Davis,* 111 Neb. 96, 195 N.W. 948 (1923), appears at first blush to be similar to the case presently before us, as the defendants against whom a default judgment had been taken, and which was subsequently reopened, had been relying entirely on the assurances of their attorney that the matter was being taken care of. However, in *Beem,* unlike the situation here, defendants had no personal knowledge to the contrary. In *Beliveau v. Goodrich,* 185 Neb. 98, 173 N.W.2d 877 (1970), there was some confusion as to what the parties had told each other they would do concerning the taking of a default judgment; that is, the default judgment seems to have been one element of negotiations carried on between the parties as to how the liability suit would be resolved. Such was not the case here. In *Barney v. Platte Valley Public Power and Irrigation District,* 147 Neb. 375, 23 N.W.2d 335 (1946), this court indicates that not all of the appropriate corporate officials were aware of the pendency of the suit, nor was counsel for the corporate entity aware of opposing counsel's intention to take a default judgment. Again, such is not the case in the instant matter. Finally, in the last case cited by Inhalation Plastics, *Anthony & Co. v. Karbach,* 64 Neb. 509, 90 N.W. 243 (1902), the parties against whom default judgment was taken were misled by the attorney, and therefore, on first reading, the case appears remarkably similar to the one at hand. This court, in affirming the setting aside of the default judgment therein, stated that one who has suffered by the dishonesty of his attorney, an officer of the court, is the victim of casualty and misfortune such as will justify the setting aside of a default judgment. However, in *Anthony* the attorney was a member of the Nebraska bar, upon whom the injured parties could

rightfully rely to represent them in the Nebraska courts. More importantly, *Anthony* is another case in which there was no showing that the injured parties themselves either knew or should have known of the status of the case.

Inhalation Plastics could not reasonably have ignored the default notices sent to its president, and should not have done so. It should have, particularly after more than one such occurrence, and particularly when the notices indicated events of such major severity were about to occur, taken some independent and meaningful steps to insure itself that its interests were in fact actually being adequately protected.

The actions of the trial court were entirely correct and, accordingly, are affirmed.

AFFIRMED.

JULENE C. MORRIS, APPELLEE, V. ROBERT LAAKER, APPELLANT.

331 N.W.2d 807

Filed April 1, 1983. No. 82-085.

1. **Directed Verdict.** A party against whom a directed verdict is requested is entitled to have every controverted fact resolved in favor of that party and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Motor Vehicles: Negligence.** By the very nature of the passing maneuver it is necessary for the passing vehicle to be in such close proximity to the overtaken vehicle that if the latter suddenly and without warning swerves so as to block the way and slows down precipitously, there may be a collision. The operator of such passing vehicle need not anticipate that a motorist being overtaken will suddenly swerve so as to block the way, nor slow or stop so as to cause the passing vehicle to lose control, and the question of the negligence of either driver is generally a question of fact for the jury.
3. **Rules of Evidence: Appeal and Error.** Generally, in the absence of an offer of proof no error may be predicated upon the court's ruling in excluding testimony.

4. **Expert Witnesses.** If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Jeffrey A. Silver, for appellant.

David A. Domina of the Domina Law Firm, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

On July 17, 1980, Julene C. Morris, the plaintiff, was operating her motorcycle in an easterly direction on Eisenhauer Avenue in Norfolk, Nebraska, following an automobile being driven by Robert Laaker, the defendant. A noncontact accident occurred which caused the plaintiff to run into the ditch on the south side of the road. As a result she was thrown from the motorcycle and sustained injuries, including multiple fractures of the left forearm. Following a jury trial in which issues as to the negligence and contributory negligence of both parties were submitted, a verdict in the amount of $15,472.31 in favor of the plaintiff was returned and judgment was entered accordingly.

The defendant has appealed to this court and assigns the following errors: (1) The court failed to direct a verdict in favor of the defendant based on the plaintiff's contributory negligence as a matter of law; (2) The court refused to allow the defendant to testify as to certain circumstances surrounding the giving of an earlier out-of-court statement; and (3) The court erred in allowing certain medical testimony without sufficient foundation.

In dealing with the first assignment of error, we are bound by the rule that the party against whom a

directed verdict is requested is entitled to have every controverted fact resolved in favor of that party and to have the benefit of every inference that can reasonably be deduced from the evidence. *Esbenshade v. National Life Ins. Co.,* 208 Neb. 216, 303 N.W.2d 272 (1981). Therefore, in that light, the jury could have found from the evidence the following: That shortly before 8 a.m. on July 17, 1980, the plaintiff was driving her 1979 Kawasaki motorcycle easterly on Eisenhauer Avenue in Norfolk, Nebraska, on her way to work; that driving ahead of her was an older automobile driven by the defendant; that before the road straightened out, she was about 3 to 4 car lengths behind the car; and that she then looked for oncoming traffic and, seeing none, accelerated for the purpose of passing the automobile. According to her testimony, as she pulled into the left-hand lane to accomplish this purpose, and was within a car length of defendant's automobile, the latter swerved over into the left-hand lane, swerved back to the center, back to the left-hand lane, and back to the center again. The plaintiff said that she then let up on the throttle, slowing down, and moved back into the right-hand lane. At this time, she was then a car length or less behind the automobile and it pulled back into the right-hand lane. She said she saw the defendant make an obscene gesture with the middle finger of his hand, and observed the brake lights of the automobile come on and the automobile slowing down. She then explained that she applied her brakes and tried to slow down because the gap between the automobile and her motorcycle was closing quickly. However, in order to avoid a collision, she stated she had to take to the ditch on the right-hand side of the road, as a result of which she lost control of the motorcycle, was thrown from it, and was injured.

It is on this set of facts that the defendant would have us conclude that the plaintiff was guilty of contributory negligence as a matter of law sufficient to

require a directed verdict. In support of that contention, he cites several authorities for the proposition that as a general rule it is negligence as a matter of law for a motorist to drive a vehicle on a highway in such a manner that it cannot be stopped in time to avoid a collision with an object within the range of vision, and that a motorist who sees an object on a highway which is abnormal must consider that a warning, requiring such motorist to slow down. We have no quarrel with *Guerin v. Forburger,* 161 Neb. 824, 74 N.W.2d 870 (1956), and *Hyde v. Cleveland,* 203 Neb. 420, 279 N.W.2d 105 (1979). However, neither case is applicable to this set of facts. *Guerin* involved a situation in which the decedent, while driving at a speed of approximately 50 miles per hour, simply ran into the rear end of the defendant's truck which was either stopped or proceeding very slowly down the highway in the same direction and which was in plain sight. *Hyde* presented a somewhat similar situation in which the plaintiff admitted seeing the lights of two vehicles side by side some 250 feet ahead of him, but failed to slow down sufficiently to avoid a collision.

The instant case was not one where the plaintiff saw a dangerous situation on the highway and failed to heed the warning, nor where she failed to observe a dangerous condition on the road ahead of her. She was attempting to pass a vehicle, which she had every right to do. By the very nature of the passing maneuver it is necessary for the passing car to be in such close proximity to the overtaken vehicle that if the latter suddenly and without warning swerves so as to block the way and slows down precipitously, there may be a collision. The operator of such passing vehicle need not anticipate that a motorist being overtaken will suddenly swerve so as to block the way nor slow or stop so as to cause the passing vehicle to lose control, and the question of the negligence of either driver is generally a question of fact for the jury. *Maurer v. Harper,* 207 Neb. 655, 300

N.W.2d 191 (1981). There is no merit to the defendant's first assignment of error.

The defendant next complains that the court refused to allow him to testify as to the nature of a discussion had with a state patrolman, during which a written statement was taken from the defendant and which statement was received in evidence as an admission. It is his position that somehow such unreported discussion would have been pertinent to rebut a charge of recent fabrication, under the provisions of Neb. Rev. Stat. § 27-801 (Reissue 1979). However, no offer of proof was made and, accordingly, error, if any, in the court's refusal to allow the defendant's testimony may not be predicated upon that ruling. *Slocum v. Hevelone,* 196 Neb. 482, 243 N.W.2d 773 (1976); Neb. Rev. Stat. § 27-103 (Reissue 1979).

Finally, objection is made to the testimony of the attending orthopedic surgeon, Dr. Goff, as to the present degree of permanent disability in the plaintiff's arm. The basis of the objection was lack of foundation, in that such physician had not seen the plaintiff since July 29, 1980, and offered his opinion as of December 3, 1981. However, Dr. Gross, another orthopedic surgeon who had examined the plaintiff as recently as November 25, 1981, and who had surgically removed the plates inserted by Dr. Goff, testified that the plaintiff had attained normal healing. However, because of a 5- to 10-degree diminished supination in the hand, he gave as his opinion that she was suffering from a 5-percent permanent disability in the left upper extremity.

The testimony of Dr. Goff, attacked by the defendant, was elicited in the form of a hypothetical question which had the witness assume a 10-degree loss of supination and an otherwise normal recovery from the original fracture surgery. His response, over objection, was that "If she has a ten-degree loss of supination I would consider this a five percent disability." Dr. Goff's testimony was indeed based upon facts furnished to him in the hypotheti-

cal question. However, there is nothing wrong with an expert witness expressing an opinion based on facts "perceived by or made known to him." Neb. Rev. Stat. § 27-703 (Reissue 1979). If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient. *Fowler v. Bachus,* 179 Neb. 558, 139 N.W.2d 213 (1966). In any event, the testimony of Dr. Goff was cumulative of that given by Dr. Gross.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

OMAHA NATIONAL BANK, TRUSTEE FOR RAYMOND C. CUTCHALL, APPELLANT, V. THE MANUFACTURERS LIFE INSURANCE COMPANY, APPELLEE.

332 N.W.2d 196

Filed April 1, 1983. No. 82-130.

1. **Jury Instructions.** In instructing a jury, the trial court is not required to define language commonly used and generally understood.
2. _____. The meaning of an instruction and not its phraseology is the important consideration. An inadvertent grammatical error in an instruction is harmless error if it is clear from the instruction itself and the other instructions given that the jury was not confused or misled by the error.
3. _____. When the trial court does not give verbatim requested instructions but does adequately instruct regarding the issues upon which the requests are made, it is not error to refuse the proffered instructions.
4. **Fraud.** Where one party to a transaction induces the other party to enter into it by willful misrepresentation, he cannot escape liability for his fraud by showing that such party could have investigated the representations made and would then have found that they were untrue.
5. _____. Contributory negligence is generally not a defense to deliberate, active, or willful fraud.
6. _____. A person is justified in relying upon a representation in all cases if it is a positive statement of fact and if an investigation would be required to discover the truth.

7. _____. The fact that inquiries were made elsewhere which did not disclose the falsity of the representations is no defense.
8. **Insurance: Fraud.** An insurer may justifiably rely on the insured's representations unless to do so would be so utterly unreasonable, in the light of the information open to it and of its skill or experience, that its loss is its own responsibility.
9. **Depositions.** If only part of a deposition of a witness is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts relevant to the issues and not introduced.
10. **Rebuttal Evidence.** The admission of rebuttal testimony is largely within the discretion of the trial court.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

John F. Thomas and William F. Hargens of McGrath, North, O'Malley & Kratz, P.C., for appellant.

Raymond M. Crossman, Jr., of Crossman & Norris, for appellee.

BOSLAUGH, MCCOWN, and HASTINGS, JJ., and BRODKEY, J., Retired, and RIST, D.J.

BOSLAUGH, J.

The plaintiff bank as trustee is the primary beneficiary of a life insurance policy issued to Raymond C. Cutchall, the insured, by the defendant insurer on March 23, 1976. Cutchall died on August 13, 1977, during the contestable period of the policy. This action was brought on December 10, 1979, to recover the proceeds of the policy.

It is undisputed that the premiums due under the policy were paid and the only issue is whether the defendant was entitled to rescission because of false representations made by the insured in the application for the policy. The premiums paid by the insured, together with interest, were paid into court by the defendant on January 15, 1980.

The record shows that on October 5, 1972, the insured consulted Dr. Thomas J. Gurnett concerning pain underneath his breastbone, which radiated into his shoulders and upper arms. Dr. Gurnett ex-

amined the insured and made a number of tests, including an electrocardiogram (EKG). The EKG showed evidence of a prior coronary thrombosis or myocardial infarction. Dr. Gurnett told the insured that he had experienced a heart attack, and prescribed nitroglycerin as a short-term vasodilator and also longer term and more persistent dilatation medicine. Dr. Gurnett advised the insured that his heart disease would be an ongoing problem.

In October 1975 the insured submitted an application for additional life insurance to The Guardian Life Insurance Company. Guardian offered to issue a policy to the insured at an increased premium because of evidence that the insured had high blood pressure. The insured then submitted applications to Business Men's Assurance Company and the defendant.

While the application to Business Men's Assurance Company was pending, the application to the defendant was accepted and the policy was then issued to the insured by the defendant.

The jury returned a verdict for the defendant, and judgment was entered on the verdict. The plaintiff has appealed. The principal issue on the appeal involves justifiable reliance, that is, whether the defendant was entitled to rely upon the statements made by the insured in the application for the policy. The plaintiff contends the evidence does not support the verdict and that certain of the instructions to the jury were erroneous. The plaintiff also contends the trial court erred in permitting the defendant to offer portions of a deposition and in refusing to allow the plaintiff to offer portions of another deposition.

In determining whether the evidence is sufficient to support the verdict, the evidence must be viewed in the light most favorable to the defendant, all questions of fact must be resolved in its favor, and it is entitled to the benefit of every inference that may reasonably be deduced from the evidence.

It is undisputed that the application submitted to

the defendant by the insured on February 4, 1976, contained the following questions and answers: "SO FAR AS YOU KNOW HAVE YOU EVER HAD ANY DISTURBANCE OF: . . . 4. The HEART, BLOOD VESSELS such as- (c) Chest discomfort, angina or heart disease?" "No"; . . . "(e) Have you had any electrocardiograms, when, why, result?" "Yes"; "4E)- 4-16-75 - Routine phys. WNL."; "4E)1-14-76 - Ins. physical." . . . "12. So far as you know have you had any illness or injury in the last 5 years not mentioned above?" "No." . . . "14. (a) Have you had any operation, treatment, hospital care or medical examination during the last 5 years not mentioned above?" "No."

The statements made on the application which were material to the risk were clearly false. The insured concealed the fact that the EKG by Dr. Gurnett in 1972 disclosed a prior heart attack and coronary artery disease, for which he had received medication.

The evidence is that the defendant relied upon the false statements in the application. If the defendant had known the truth concerning the heart disease of the insured, it would have requested additional information and would not have issued the policy or would have offered a policy at a much higher premium.

The insured died on August 13, 1977, of cardiac arrest as a consequence of an acute myocardial infarction.

The plaintiff contends that the defendant's failure to properly investigate the information available to it precluded justifiable reliance upon the false statements made by the insured.

In addition to the application submitted by the insured, the defendant required that a "heart chart" be completed by a local physician, including an EKG which was made on January 14, 1976. The examination was made by Dr. David Jasper, the personal physician of insured, and the chart was com-

pleted by him. The insured did not consult Dr. Gurnett after February 23, 1973, and did not advise Dr. Jasper of Dr. Gurnett's diagnosis and treatment for his previous difficulty.

The insured reported a negative history of heart disease on the chart submitted to the defendant. In a letter to the defendant dated February 27, 1976, Dr. Jasper stated that the insured was in "excellent health" except for a brief occurrence of high blood pressure.

The application submitted by the insured, together with the other medical evidence submitted to the defendant, was reviewed by Dr. Paul Aggett, a cardiovascular and peripherovascular surgeon, who is the associate medical director for the defendant. Dr. Aggett testified that he relied on the answers to the health questions in the application, and the heart chart submitted by Dr. Jasper. He interpreted the January 14, 1976, EKG supplied by Dr. Jasper as being "within normal limits."

Much of the evidence concerns the interpretation of the January 14, 1976, EKG. Several cardiologists called as expert witnesses by the plaintiff testified that the EKG was "abnormal" and indicated a prior myocardial infarction. These witnesses varied in their testimony as to how positive or apparent the abnormality was shown, and all conceded that the interpretation of an EKG is a matter of opinion about which experts may differ. The evidence further shows that it is possible for a person to have a normal EKG although having suffered a prior heart attack. The evidence also shows that an EKG may be influenced by many factors extraneous to the condition of the patient's heart.

The most that can be said regarding the interpretation of the EKG of January 14, 1976, is that the evidence was conflicting and presented a question of fact for the jury. The jury resolved the conflict in favor of the defendant, and the evidence supports that finding.

The evidence shows that insurance companies can obtain information on applicants for insurance from two sources. The Medical Information Bureau (MIB) is a centralized information bank for medical information collected by member insurance companies. Equifax is a company which investigates applicants.

The defendant requested information on Cutchall from MIB on two occasions. The first time was after the application had been received. The second request was made after Cutchall had asked to increase the coverage. Neither response indicated that Cutchall had heart disease. The defendant did not subscribe to a service whereby MIB would provide followup information.

After Cutchall's death the defendant requested an Equifax investigation. The report revealed information concerning Cutchall's heart condition which was in Equifax's files at the time the policy was issued.

The plaintiff argues that the trial court improperly instructed the jury on the elements of misrepresentation.

Instruction No. 7 instructed the jury that in order to find for the defendant it must find by clear and convincing evidence that Cutchall made a misrepresentation in response to questions asked on the application. The plaintiff complains that the instruction did not state that the false statements relied upon must constitute part of the completed application endorsed upon or annexed to the policy. The application was in fact attached to the policy and there was no issue of fact concerning the matter. It was not error to not submit that question to the jury.

The plaintiff contends that the court should not have used the term "misrepresentation" without defining it. The meaning of "misrepresentation" is reasonably clear and no further definition was required. In instructing a jury the trial court is not

required to define language commonly used and generally understood. *Otte v. Taylor,* 180 Neb. 795, 146 N.W.2d 78 (1966); *Flanagin v. DePriest,* 182 Neb. 776, 157 N.W.2d 389 (1968). There was no prejudicial error.

The plaintiff further argues that instruction No. 7 was erroneous because it required the jury to find for the defendant if the "defendant relied on the truthfulness of the misrepresentation . . . and was therefore deceived to its injury." The plaintiff argues that this equated reliance with injury; that is, if the defendant relied, it was injured. It is apparent that the instruction should have read "thereby" instead of "therefore." In *Greenberg v. Bishop Clarkson Memorial Hospital,* 201 Neb. 215, 221, 266 N.W.2d 902, 907 (1978), we said: "The meaning of an instruction and not its phraseology is the important consideration. . . . An inadvertent grammatical error in an instruction is harmless error if it is clear from the instruction itself and the other instructions given that the jury was not confused or misled by the error." The remainder of instruction No. 7 and instruction No. 9 made it clear that to find for the defendant, the jury was required to find that the defendant issued the policy in reliance upon Cutchall's misrepresentation. There was no prejudicial error.

The plaintiff argues that the jury was improperly instructed on the element of reliance. The plaintiff requested four instructions dealing with reliance. The first stated that an insurer can not rely on a misrepresentation if, through "proper attention to its own business," it should have known that such statements were false. The second stated that an insurer has a duty to investigate if the insurer had facts in its possession which would have led a prudent person to make such an inquiry, and an insurer will be charged with the knowledge it should have known. The third stated that an insurer will be charged with knowing what is in its files. The

fourth stated that if an investigation is conducted, the insurer is chargeable with the knowledge which would have been revealed by a thorough investigation. All four instructions were refused.

The trial court instructed the jury that an insurer may rely on the answers given in an application and need not conduct an investigation. Such reliance is not justified if there is something to put the insurer on notice that the answers are false. Such notice may require an investigation. The jury was instructed that the fact that an investigation is conducted by the insurer does not absolve the applicant from speaking the truth nor lessen the right of the insurance company to rely on the applicant's statements.

This instruction, together with an instruction dealing with imputing knowledge of its agents to the corporation, incorporates portions of the instructions requested by the plaintiff. The jury was instructed that notice of certain facts may negate justifiable reliance or may require the insurer to conduct an investigation. Thus, the jury was instructed that an insurer will be charged with knowing what is in its files; that is, it can not justifiably rely where it has actual knowledge of a falsehood. The jury was further instructed that a duty may exist to investigate if there are facts available to prompt such an investigation. When the trial court does not give verbatim requested instructions but does adequately instruct regarding the issues upon which the requests are made, it is not error to refuse the proffered instructions. *Jones v. Consumers Coop. Propane Co.*, 186 Neb. 629, 185 N.W.2d 458 (1971); *Treffer v. Seevers,* 195 Neb. 114, 237 N.W.2d 114 (1975); *Belitz v. Suhr,* 208 Neb. 280, 303 N.W.2d 284 (1981).

The court did not instruct the jury that an insurer can not rely on a misrepresentation if, through "proper attention to its own business," it should have known of the falsehood. Nor was the jury instructed that an insurer who conducts an investiga-

tion will be chargeable with the knowledge which should have been revealed by a thorough investigation.

The plaintiff relies upon *Traynor v. Automobile Mutual Ins. Co.*, 105 Neb. 677, 181 N.W. 566 (1921), as the basis for the first requested instruction. In the *Traynor* case the insured in good faith had indicated on the application that the automobile to be insured was built in 1913 when in fact it had been built in 1910. The judgment on a directed verdict for the defendant, who had asserted misrepresentation as a defense to its liability on the policy, was reversed. This court held that the statement as to when the car was built was not an index of the car's real value and thus not material to the risk. The court further stated that there was no deception to the injury of the insurer, and since *the model number of the car was revealed on the application,* the insurer had the duty and the means to ascertain the truth through "proper attention to its own business." *Id.* at 683, 181 N.W. at 568.

The plaintiff urges that the *Traynor* case creates a duty to discover the truth based on a standard of care of "proper attention to its own business." Thus, the plaintiff would hold the insurer to a standard of due care in issuing policies. This conclusion does not follow.

It is a general rule that a party can not set up negligence as a defense to an intentional act, but may when negligence rather than intent is pleaded against him. "In an action for . . . negligent misrepresentation, an honest belief in the truth of the representation is no defense, although the defense of contributory negligence is available . . . ." 86 C.J.S. *Torts* § 50 at 973 (1954). "[W]here the defendant's conduct is actually intended to inflict harm upon the plaintiff, there is a difference, not merely in degree but in the kind of fault; and the defense [contributory negligence] never has been extended to such intentional torts." W. Prosser, Law of Torts, *Negli-*

gence: Defenses § 65 at 426 (4th ed. 1971).

In *Hoock v. Bowman,* 42 Neb. 80, 85, 60 N.W. 389, 390 (1894), this court said: "The omission by one of the parties to an agreement, to make inquiries as to the truth of facts stated by the other, cannot be imputed to him as negligence. Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual agreement."

In 37 Am. Jur. 2d *Fraud and Deceit* § 250 at 333-34 (1968), the text states: "In consideration of the effect of negligence of a representee on the right to rely, the policy of the law toward actual fraud must always be considered, since, under modern judicial concepts of social relationship, the actual wrongdoing of the representor is considered to outweigh the carelessness of the representee, at least in instances of actual machination and deception. It has frequently been stated or held that the doctrine of negligence does not authorize deception in what is said or unsaid, and hence, the effect of negligence on the part of the party deceived may be tolled by the active fraud of the other party. In other words, the rule sanctioned by most of the courts is that where one party to a transaction induces the other party to enter into it by wilful misrepresentation, he cannot escape liability for his fraud by showing that such party could have investigated the representations made and would then have found that they were untrue. According to this view, negligence in trusting a representation will not excuse a positive wilful fraud, and contributory negligence is generally held not to be a defense to deliberate, active, or wilful fraud."

The general rule is that a person is justified in relying upon a representation in all cases if it is a positive statement of fact and if an investigation would be required to discover the truth. *Fricke v. Hart,* 206 Neb. 590, 294 N.W.2d 737 (1980). The fact that in-

quiries were made elsewhere which did not disclose the falsity of the representations is no defense. *Foxley Cattle Co. v. Bank of Mead,* 196 Neb. 1, 241 N.W.2d 495 (1976).

While no action will lie where ordinary prudence would have prevented the deception, that rule is generally applied where the means of discovering the truth was in the hands of the party defrauded. It is applicable where the party who claims to have been defrauded failed to read an instrument before signing it, or purchased real estate after inspecting the property and failed to notice obvious defects. See, *Erftmier v. Eickhoff,* 210 Neb. 726, 316 N.W.2d 754 (1982); *Dyck v. Snygg,* 138 Neb. 121, 292 N.W. 119 (1940).

Prosser, in a discussion of justifiable reliance as an element of an action for misrepresentation, dealt with the defense of contributory negligence and set forth the following standard of conduct: "[W]here there is an intent to mislead, it [contributory negligence] is clearly inconsistent with the general rule that mere negligence of the plaintiff is not a defense to an intentional tort. The better reasoned cases have rejected contributory negligence as a defense applicable to intentional deceit . . . .

". . . [T]he person deceived is not held to the standard of precaution, or of minimum knowledge, or of intelligent judgment, of the hypothetical reasonable man . . . .

"Rather . . . the matter seems to turn upon an individual standard of the plaintiff's own capacity and the knowledge which he has, or which may fairly be charged against him from facts within his observation . . . ." W. Prosser, Law of Torts, *Misrepresentation* § 108 at 716-17 (4th ed. 1971).

As applied to insurers, it has been held that they may justifiably rely on answers given them. "As a general rule, one has no duty to investigate another's representation, but may rely on its truth." *Fireman's Fund Ins. Co. v. Knutsen,* 132 Vt. 383, 392,

324 A.2d 223, 229 (1974). 12A Appleman, Insurance Law and Practice § 7296 (1981). The caveat to this rule is found in *Apolskis v. Concord Life Insurance Company,* 445 F.2d 31, 36 (7th Cir. 1971): "An insurance company need not make any independent investigation and may rely on the truthfulness of answers contained in an insurance application at least if there is nothing to put it on notice that certain answers may be false."

In *Fireman's Fund Ins. Co. v. Knutsen, supra,* the court held that there is no obligation to investigate each routine application where no suspicion arises.

The language of negligence is notably absent in these cases. The implication of these cases is that an insurer may justifiably rely on the insured's representations unless to do so would be "so utterly unreasonable, in the light of the information open to him," and of his skill or experience, "that his loss is his own responsibility." W. Prosser, *supra* § 108 at 715. "[A] fraud-feasor will not be heard to assert that his victim was negligent in relying on the misrepresentation." *Kubeck v. Consolidated Underwriters,* 267 Or. 548, 555, 517 P.2d 1039, 1042 (1974).

Thus, the prudent person standard is not applicable to an insurer's review of applications or to the decision to investigate. Nor should the insurer be held to a negligence standard in making an investigation. See *Fireman's Fund Ins. Co. v. Knutsen, supra.* Rather, the actions of the insurer should not be "so utterly unreasonable" that there could be no justifiable reliance. The instructions imposing a negligence standard were properly refused.

Parker Precision Products Co. v. Metropolitan Life Ins. Co., 407 F.2d 1070 (3d Cir. 1969), involved facts similar to the present case. EKGs taken in 1957, 5 years before the application, revealed a heart attack. In 1962 insured's physician did not, at insured's request, report the heart attack nor indicate any abnormalities in the insured's EKGs of 1959 and 1960 in the insurance application. All EKGs re-

mained in the possession of the attending physician. The insurer's examiner relied on these representations in rating the application. The court held that when an insured answers a question and there is nothing else in the application to impair that statement, the insurer is entitled to rely on the answer given. A report on the application by a medical examiner consistent with the answers is sufficient to warrant this reliance. The court further indicated that an insurer is not under an obligation to examine each applicant to reveal obscure health problems.

The instruction that the fact that an investigation was conducted does not absolve the applicant from telling the truth nor lessen the right of reliance was proper. *Wainwright v. Washington Nat. Ins. Co.,* 142 Neb. 372, 6 N.W.2d 368 (1942). See, also, *MFA Mut. Ins. Co. v. Meisinger,* 183 Neb. 285, 159 N.W.2d 829 (1968); *Allstate Ins. Co. v. Vincent Meloni, et al.,* 98 N.J. Super. 154, 236 A.2d 402 (1967); 12A Appleman, *supra* § 7296.

The plaintiff argues that the insurer should not have been permitted to read into the record portions of the deposition of Otto Staehr and to introduce an exhibit from the deposition. The plaintiff asserts that since counsel for the insurer was not present at the deposition it waived the right to cross-examination.

The plaintiff had read part of the Staehr deposition at the trial. The defendant then read a statement and offered an exhibit which, with the plaintiff's consent, had been included in the deposition by the counsel for Staehr's employer, MIB.

Neb. Rev. Stat. § 25-1267.04(4) (Reissue 1979) provides: "If only part of a deposition of a witness is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and *any party may introduce any other parts relevant to the issues and not introduced.*" (Emphasis supplied.) The evidence was properly admitted.

Further, because the plaintiff consented to the statement being made a part of the deposition record, it was estopped from complaining of its use at trial. See *Smith v. Smith,* 201 Neb. 21, 265 N.W.2d 855 (1978). Foundation for the exhibit was properly laid through the deposition.

On rebuttal the plaintiff sought to read portions of the deposition of Dr. Aggett as admissions against interest. The trial court excluded this evidence, stating that Dr. Aggett had been on the witness stand for several hours, during which time counsel had ample opportunity to confront him with the deposition. At the time of rebuttal Dr. Aggett was unavailable. The plaintiff argues that the exclusion of this deposition testimony of Dr. Aggett was reversible error.

In *Hyde v. Cleveland,* 203 Neb. 420, 279 N.W.2d 105 (1979), we held that it may be error to refuse deposition testimony offered as an admission on rebuttal. However, it must be shown that the exclusion of the evidence prejudiced the defendant in some way. *Bailey v. Mohr,* 199 Neb. 29, 255 N.W.2d 866 (1977).

Here, the plaintiff had been permitted to cross-examine Dr. Aggett at length concerning his deposition. During that examination, Dr. Aggett repeatedly sought to explain the technical nature of his answers. The excluded evidence, which consisted of isolated bits of technical testimony taken out of context of such explanation, did not clearly constitute admissions against interest. It was also somewhat cumulative.

The admission of rebuttal testimony is largely within the discretion of the trial court. *Gee v. Dinsdale Brothers, Inc.,* 207 Neb. 224, 298 N.W.2d 147 (1980). Since the plaintiff was allowed to probe into the deposition at length on cross-examination, no prejudice resulted to the plaintiff. To have admitted the evidence would have been prejudicial to the defendant because the technical nature of the testimony warranted an opportunity to explain.

There being no error, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LESTER REDDING, ALSO KNOWN AS JACK JOHNSON, APPELLANT.

331 N.W.2d 811

Filed April 1, 1983. No. 82-168.

1. **Jury Instructions.** It is the duty of the trial court to instruct the jury on the correct law of the case whether requested to do so or not.
2. **Criminal Attempt: Theft: Value of Goods.** The value of goods stolen under Neb. Rev. Stat. §§ 28-510 et seq. (Reissue 1979) is a material or essential element of the crime of attempted theft in order to establish the gradation of the offense, and it must be proven beyond a reasonable doubt.
3. **Value of Goods.** In the absence of evidence to the contrary, cash in the amount of $12,000 must have a value of "over one thousand dollars."
4. **Criminal Attempt: Theft: Value of Goods.** If the uncontroverted evidence supports a finding beyond a reasonable doubt of the attempted theft of but one item of property consisting of cash of a stated amount, the fact that a jury returns a verdict of guilty based upon instructions which failed to include specific value as a material element of the crime is harmless error.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Sean J. Brennan, for appellant.

Paul L. Douglas, Attorney General, and Martel J. Bundy, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

HASTINGS, J.

The defendant, Lester Redding, following a jury trial, was convicted of the offense of attempted theft by deception of property of the value of more than $1,000, a violation of Neb. Rev. Stat. §§ 28-512 et seq.

(Reissue 1979), and a Class IV felony. He has appealed to this court and has assigned but two errors, which can be restated as follows: That the court failed to include in its instructions that the value of the property stolen was an essential element of the crime and therefore required proof beyond a reasonable doubt. He makes no complaint of the jury's finding that he was guilty of the attempted theft of some property of value.

Section 28-512 provides in part that "A person commits theft if he obtains property of another by deception. . . ." Section 28-518 provides that "(1) Theft constitutes a Class III felony when the value of the thing involved is over one thousand dollars." Neb. Rev. Stat. § 28-201(1) (Reissue 1979) states that a person is guilty of an attempt to commit a crime if he "(b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime." Section 28-201(4) provides that criminal attempt is a Class IV felony when the crime attempted is a Class III felony. The penalty imposed in this case, imprisonment of from 20 months to 4 years, was within the statutory limits for a Class IV felony.

Although the evidence necessary to support a conviction of theft of property of value is not contested, it is necessary to set forth some of the facts in order to resolve the legal problem presented.

On June 8, 1981, the victim met the defendant and what turned out to be two of his accomplices under somewhat strange, albeit apparently planned, circumstances. The victim was enticed into a three-card shell or shill game, into the "pot" of which game he had placed his watch, ring, and billfold, worth approximately $234. He lost that game to the defendant. He was given a chance to win back his property in a game which the defendant insisted be played for $15,000. The victim won. However, as the defendant started to pay off, he suddenly chal-

lenged whether the victim could have paid off had he lost, and eventually insisted that the victim obtain $12,000 in cash and show it. Leaving his property, which was a part of the "pot," with the defendant's female accomplice, the victim and the second accomplice went to a downtown financial institution. While there, the victim actually took out a loan of $12,000 and a draft to his order was actually issued, although the victim did not take it with him. He did ask to use a phone, dialed 911, asked that the authorities be notified of the circumstances of the apparent confidence game, and requested that the police be notified that he was returning to the parking lot on the edge of town where the "action" was taking place. He then returned to the parking lot with the one accomplice and they were reunited with the defendant and the other accomplice. Immediately thereafter, the police arrived and the three took off in different directions, but were all arrested. The red handkerchief containing the victim's property, as well as a large amount of currency which the defendant had placed in the "pot," was found by a police officer underneath a car several stalls down from the victim's vehicle and on the route of escape that the female accomplice had attempted.

The principal complaint of the defendant involves the giving of instruction No. 5. By that instruction the court informed the jury as follows: "The *material elements* which the state must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime charged are:

"1. That the defendant intentionally engaged in conduct which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended to culminate in his commission of the crime of theft by deception.

"2. That defendant did attempt to steal by deception money or property of value belonging to [the victim].

"3. That he did so on or about the 8th day of June, 1981, in Lancaster County, Nebraska.

"The state has the burden of proving beyond a reasonable doubt each and every one of the *foregoing material elements* necessary for a conviction.

"If you find beyond a reasonable doubt that the defendant is guilty of attempted theft by deception it will be necessary for you to find the value of the money or property attempted to be taken by deception from [the victim], if any.

"If you find from the evidence beyond a reasonable doubt that each of the *foregoing material elements* is true, it is your duty to find the defendant guilty. On the other hand, if you find the state has failed to prove beyond a reasonable doubt any one or more of the *foregoing material elements* it is your duty to find the defendant not guilty.

"The burden of proof is always on the state to prove beyond a reasonable doubt all of the *material elements* of the crime charged, and this burden never shifts." (Emphasis supplied.)

The defendant's counsel objected to the giving of instruction No. 5 in the following manner: "My objection to that instruction, Your Honor, is that the instruction be omitted entirely and in substitute thereof the standard Nebraska Jury Instruction on lesser included crimes to be substituted for this instruction." The court's response was in part as follows: "The jury, however, can determine . . . the value of the items so taken or attempted to be taken. And the Court's position is that the statute on theft by deception or the theft statutes, the crime is the theft. The value that is involved goes to the punishment, and the jury will find under the verdicts [sic] the amount of property taken. And therefore, there is a lesser included offense the way the instructions are structured."

The foregoing objection is not literally in accord with those raised by the defendant in his assignments of error. However, we believe that the trial

court was sufficiently informed of the claimed defect in general so as to have been given the opportunity to remedy any such deficiency if it had felt it necessary to do so. In any event, it is the duty of the trial court to instruct the jury on the correct law of the case whether requested to do so or not. *State v. Duis,* 207 Neb. 851, 301 N.W.2d 587 (1981). The jury returned a verdict of guilty as charged and declared the value of the property to be $12,000. The question on this appeal is whether a specific value of property is a material element of the crime or if it is only a factor going to the classification of the crime for punishment purposes, and in any event what burden of proof must be met by the State to prove such value.

It is readily apparent from an examination of instruction No. 5 that value was not included within the term "material elements," and therefore the jury was never instructed as to what burden of proof must be met in determining such value.

Prior to the adoption of the present Nebraska Criminal Code there were two "grades" of larceny: grand larceny and petit larceny. Neb. Rev. Stat. § 28-506 (Reissue 1975) provided in part that "Whoever steals . . . goods . . . the property of another, of the value of three hundred dollars or upwards . . . shall, upon conviction thereof, be imprisoned . . . not more than seven years . . . ." Petit larceny was defined by Neb. Rev. Stat. § 28-512 (Reissue 1975) in part: "(1) If any person shall steal any . . . goods . . . of less value than three hundred dollars, the property of another, . . . upon conviction . . . shall be punished by imprisonment in the county jail not more than six months . . . ." In *State v. Frandsen,* 199 Neb. 546, 260 N.W.2d 206 (1977), we held, in effect, that a material element of a crime of *petit larceny* was that the defendant stole " 'property of value' " without requiring a declaration by the jury of a specific value. Obviously, this was consistent with the then existing statute which required only

that the property stolen be found to be of less value than three hundred dollars. However, in *State v. Hayes,* 187 Neb. 325, 326, 190 N.W.2d 621, 622 (1971), a prosecution for grand larceny, we said: "The value of the goods in question is an essential element of the crime and like all other elements thereof the evidence must be sufficient to support a finding of the necessary value beyond a reasonable doubt."

We presently have four grades of larceny, or theft: Class III felony, Class IV felony, Class I misdemeanor, and Class II misdemeanor, all having common elements except for the value of the goods stolen. § 28-518. We see no reason why the same rationale as that contained in *Frandsen* and *Hayes* should not apply to the present statutes. In other words, if all that is proven beyond a reasonable doubt is that goods of value were stolen, it is a Class II misdemeanor, "the value of the thing involved is one hundred dollars or less." § 28-518(4). On the other hand, to establish a Class III felony, an essential element of the crime is to prove beyond a reasonable doubt that "the value of the thing involved is over one thousand dollars." § 28-518(1). The instruction was clearly incomplete and therefore erroneous.

The question now remaining is whether the giving of such instruction was prejudicial to the rights of the defendant. In *State v. Tamburano,* 201 Neb. 703, 271 N.W.2d 472 (1978), we held that where the State offers uncontroverted testimony on an essential element of a crime, mere speculation that the jury might disbelieve the testimony does not entitle the defendant to an instruction on a lesser-included offense. In that case the defendant was charged with first degree sexual assault, which required proof of penetration. The defendant had insisted that an instruction on second degree sexual assault be given, which only necessitated proof of sexual contact. The only evidence offered on that issue was the testimony of the prosecutrix, who claimed that penetra-

tion was achieved. We went on to say: "Evidence which requires the submission of a lesser-included offense is necessarily left to a case-by-case basis. It is sufficient to say that that evidence does not rise to that required level by speculating that an essential element uncontroverted in the evidence may be disbelieved by the jury." *Id.* at 708, 271 N.W.2d at 475.

The rationale of *Tamburano* is applicable here. The defendant offered no evidence. The testimony of the victim established without question that the ring, watch, and billfold had already been "obtained" by the defendant. The jury determined under proper instructions that beyond a reasonable doubt there had been an attempted theft of property of value. The only evidence relating to such property involved the $12,000 in cash. It would be ludicrous to argue that $12,000 in cash is not a thing of value of "over one thousand dollars." If the uncontroverted evidence supports a finding beyond a reasonable doubt of the attempted theft of but one item of property consisting of cash of a stated amount, the fact that a jury returns a verdict of guilty based upon instructions which failed to include specific value as a material element of the crime is harmless error. The error in the giving of instruction No. 5 was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), *rehearing denied* 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241.

The judgment and sentence of the District Court are affirmed.

AFFIRMED.

WHITE, J., dissenting.

The reliance on *State v. Tamburano,* 201 Neb. 703, 271 N.W.2d 472 (1978), by the majority is misplaced. *Tamburano* did not relieve the trial court of its heretofore mandatory duty to instruct the jury that each essential element of a crime must be proven beyond a reasonable doubt. *State v. Hayes,* 187 Neb. 325, 190 N.W.2d 621 (1971). *Tamburano* stands

for the simple principle that if the defendant desires a lesser-included instruction, some evidence must be present in the record tending to show that a lesser crime was in fact committed. We specifically did not deal with burden of proof.

In this case we simply are not able to state the standard by which the jury found that the amount attempted to be stolen was $12,000. In the absence of a specific instruction by the trial court that the standard of proof is beyond a reasonable doubt, the error is obvious and the case must be reversed and remanded.

McCOWN and CAPORALE, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. ARTHUR H. HELLBUSCH, APPELLANT.

331 N.W.2d 815

Filed April 1, 1983. No. 82-189.

1. **Directed Verdict: Waiver.** Where a motion for a directed verdict is made at the close of the evidence of the State in a criminal case, introduction of evidence thereafter by the defendant waives any error in ruling or failing to rule on the motion. The defendant, however, is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction.
2. **Criminal Law: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
3. **Sentences: Appeal and Error.** In the absence of an abuse of discretion a sentence imposed within statutory limits will not be disturbed on appeal.

Appeal from the District Court for Colfax County: JOHN M. BROWER, Judge. Affirmed.

Mark M. Sipple of Luckey, Sipple & Hansen, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

MCCOWN, J.

The defendant was found guilty by a jury of felony motor vehicle homicide. He was sentenced to 3 years' probation, conditioned that the first 90 days be served in the county jail, and fined $10,000.

On June 27, 1981, at approximately 10 a.m., the defendant was driving a pickup truck towing an irrigation trailer on a two-lane highway in Colfax County, Nebraska. The defendant attempted to pass a vehicle in front of him while going around a curve in a no-passing zone. He crossed over the solid yellow no-passing line into the left lane of traffic where he collided with an oncoming motorcycle driven by Norman Brown, who was killed in the accident.

A trooper of the State Patrol arrived at the accident scene and administered an alcohol breath test to the defendant. The equipment was calibrated so that anyone having a blood alcohol content of .13 or less would have passed the test. The defendant failed the test. Following the breath test the defendant was taken to a nearby hospital, where he submitted to a blood test. The blood test showed a body fluid alcohol content of .166. The defendant was charged with felonious motor vehicle homicide in causing the death of Norman Brown while operating a motor vehicle while under the influence of alcohol in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1978).

Trial was held beginning January 27, 1982. The jury found the defendant guilty of felony motor vehicle homicide. The defendant was sentenced to 3 years' probation, with the first 90 days to be served in the county jail, and upon release he was ordered to enter an inpatient alcohol program in Omaha, Nebraska. His driver's license was suspended for 1

year and he was ordered to pay a fine of $10,000 and the costs of the action.

The defendant first contends that the trial court erred in overruling a motion to dismiss at the close of the State's case in chief. The argument is that the state trooper's evidence was insufficient to establish that the violation of the drunk driving law was the proximate cause of the death of Brown. The defendant tacitly concedes that medical testimony offered by the State in rebuttal may have been sufficient to establish the issue. Even if there were some doubt as to whether the State presented sufficient evidence to constitute a prima facie case in its case in chief, the defendant waived any error on that score by proceeding to present evidence. The defendant cannot now be heard to complain of the trial court's failure to dismiss the case at the conclusion of the State's case in chief where the defendant proceeded thereafter to present evidence on his behalf. Where a motion for a directed verdict is made at the close of the evidence of the State in a criminal case, the introduction of evidence thereafter by the defendant waives any error in ruling or failing to rule on the motion. The defendant, however, is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction. *State v. Hilpert, ante* p. 564, 330 N.W.2d 729 (1983); *Henggler v. State,* 173 Neb. 171, 112 N.W.2d 762 (1962).

The defendant also contends that the evidence is insufficient to support the verdict of guilty. The jury was specifically instructed that it must find that the defendant's intoxication proximately and directly caused the death of Norman Brown. There is no serious question that the evidence in this case was more than sufficient to support the jury verdict. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass upon the credibility of

witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. True,* 210 Neb. 701, 316 N.W.2d 623 (1982).

Finally, the defendant contends that his sentence is excessive. Defendant argues that because he is 65 years old, and has no prior criminal record and only minor traffic violations, no jail sentence should have been given and the maximum fine should not have been assessed.

The maximum statutory penalty for the offense involved here is 5 years' imprisonment or a $10,000 fine, or both. The only imprisonment involved here was 90 days in the county jail, imposed as a condition of probation, and there is no evidence that the imposition of the maximum fine was not fully justified.

This court has consistently held that in the absence of an abuse of discretion a sentence imposed within statutory limits will not be disturbed on appeal. *State v. Last,* 212 Neb. 596, 324 N.W.2d 402 (1982). There was no abuse of discretion in the present case.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANIEL J. McMAHON, APPELLANT.

331 N.W.2d 818

Filed April 1, 1983. No. 82-284.

Pleas. A plea of guilty cannot be voluntary if the defendant is unaware of the penal consequences of such plea because of having been misinformed by the trial court, and such plea must be vacated and the defendant rearraigned.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein, for appellant.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

Following a plea of guilty, Daniel J. McMahon was convicted of the crime of delivering marijuana, a violation of Neb. Rev. Stat. §§ 28-416(1)(a) and (2)(b), and 28-405, Schedule I (c)(10) (Cum. Supp. 1982), a Class III felony. He was sentenced to a term of imprisonment of not less than 3 nor more than 5 years. The defendant assigns as error on appeal that the District Court, in connection with the arraignment proceedings, misinformed him as to the possible penalty for the crime, i.e., that it included imprisonment of up to 5 years or a $10,000 fine, or both such fine and imprisonment, when in fact the correct penalty for a Class III felony was not less than 1 year nor more than 20 years or a $25,000 fine, or both such fine and imprisonment.

It is apparent that the actual maximum penalty imposed on the defendant was within the limitation erroneously stated by the trial court. He therefore suffered no prejudice in that regard. However, the minimum portion of the indeterminate sentence, 3 years, exceeded by 16 months that which the court could have imposed had its advice to the defendant of the limitation of "up to five years" been correct. Neb. Rev. Stat. § 83-1,105(1) (Reissue 1981). We cannot order a reduction of the minimum sentence to 20 months because it was a permissible sentence for a Class III felony.

What we are here faced with is a situation in which the defendant was unaware of the penal consequences of his guilty plea because he had been misinformed by the court, and therefore his plea could hardly be said to have been voluntary. *State v. Turner,* 186 Neb. 424, 183 N.W.2d 763 (1971). In *State v. Curnyn,* 202 Neb. 135, 274 N.W.2d 157 (1979), after directing a hearing on the issue of whether the defendant had knowledge of the applicable penalties, we said: "If the court finds he was not aware of the penal consequences of the plea, the judgment of conviction shall be deemed vacated and he shall be permitted to plead again." *Id.* at 140-41, 274 N.W.2d at 161.

The judgment and sentence of the District Court are reversed and vacated and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

COZAD CARPET CENTER, INC., A NEBRASKA CORPORATION, APPELLEE, V. FAY MALOLEY, APPELLANT.
331 N.W.2d 547

Filed April 1, 1983. No. 82-665.

Appeal from the District Court for Dawson County: KEITH WINDRUM, Judge. Affirmed.

Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Claude E. Berreckman, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The court, having reviewed the record, finds no error. The judgment of the trial court is, in all respects, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. ROBERT L. ROTH, APPELLEE.

331 N.W.2d 819

Filed April 1, 1983. No. 82-824.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed.

Michael G. Heavican, Lancaster County Attorney, and Thomas S. Jaudzemis, for appellant.

Robert B. Creager of Berry, Anderson, Creager & Wittstruck, for appellee.

McCOWN, J.

This is an appeal by the State to a single judge of the Supreme Court for summary review of an order of the District Court for Lancaster County granting a motion to suppress physical evidence in a criminal case charging possession of cocaine with intent to deliver. The application for and grant of review have been made pursuant to Neb. Rev. Stat. § 29-824 (Cum. Supp. 1982).

On September 26, 1981, two undercover police officers of the Lincoln Police Department were detailed for surveillance of a residence in Lincoln, Nebraska, in connection with a drug investigation. When they arrived at the scene, the officers noticed a pickup truck with a camper shell on it parked in front of the house. As the officers watched, a man, a woman, and a small child walked from the yard to the area near the camper, and the man placed an article in the back of the camper. Shortly afterward, the woman and child went into the house and the man got in the pickup and drove away.

The officers followed in their unmarked car for a few blocks and obtained the license number of the pickup. There were no traffic violations by the vehicle, but at a heavy traffic intersection a few blocks from the house the officers lost the pickup. The officers ran a radio check on the license number of the

pickup and were informed that the license plates had expired.

The undercover officers called for assistance from the uniformed division to locate the pickup. Officer Knuth was detailed to assist the undercover officers. She located the pickup parked on the street in front of a house 4 or 5 blocks away from the intersection where the officers had lost it. It was in a residential area of Lincoln which had no history of drug traffic. Officer Knuth informed the undercover officers by radio of the location.

The two undercover officers met her near that location and informed her that the first residence had been under surveillance by the undercover officers and that the driver of the pickup had come from that house and placed something in the rear of the camper. She knew that the undercover officers worked with the drug unit. She was also told by the undercover officers to ticket the pickup for improper plates and to look closely to see if any drugs or drug paraphernalia were in plain view.

Officer Knuth went to the parked pickup and ticketed it for improper plates. The window on the driver's side was open and she looked into the cab of the pickup and observed a partially smoked hand-rolled cigarette resting in plain view in the open ashtray. In her opinion it was a marijuana cigarette.

Officer Knuth radioed the information to the undercover officers and was instructed to watch the vehicle. Officer Knuth was parked approximately a block away from the pickup. She saw a white male come out of the house and enter the pickup truck. He remained in the truck a short time and then got out and went back into the house. Two or three minutes later he again came out, got into the pickup, and drove away. Officer Knuth followed. She activated her red lights and followed for a few blocks, honking her horn, but had no response. She turned on her siren and the pickup pulled over and stopped. Officer Knuth had called for assistance as she fol-

lowed, and Officer Palmer arrived on the scene as the pickup pulled over.

Officer Knuth approached the pickup and asked the driver for his license and registration. He handed her his license and she told him that she wanted to talk to him about the "roach" in the ashtray. The driver leaned over, pushed the cigarette into the ashtray, closed the ashtray, and told Officer Knuth it was not important. Officer Knuth asked him to get out of the vehicle and ordered him to stand with Officer Palmer.

Officer Knuth got into the vehicle, removed the marijuana cigarette from the ashtray and examined it, noting the presence of seeds, and identified it as a marijuana cigarette. Officer Knuth then asked the driver what the roach was doing in the truck and he replied it belonged to someone else whose name he could not reveal. The driver was cited and placed under arrest for possession of marijuana, patted down, and put in the back seat of the police cruiser.

Officer Knuth and Officer Palmer then proceeded to search the cab of the pickup. They opened the glove compartment where they discovered a bag containing a sifter, a small bottle, and a white powdery substance which was identified as cocaine. The defendant was thereafter charged with possession of cocaine with intent to deliver.

The defendant filed a pretrial motion to suppress the physical evidence seized from the pickup cab. Following the evidentiary hearing on the motion the District Court found that the search incident to a lawful arrest doctrine was not applicable, and there was no probable cause to search inside the vehicle. The District Court therefore granted the motion, suppressed all physical evidence seized from the cab of the pickup, and this appeal followed.

The critical issue in this case is whether probable cause existed to arrest the defendant for possession of marijuana at the time Officer Knuth ordered the defendant out of the pickup. This court has con-

sistently followed the doctrine that where contraband materials in a motor vehicle are in plain view of an officer, who has a lawful right to be in the position from which he makes his observations, there is probable cause to make an arrest and seize the contraband. See, *State v. Shepardson,* 194 Neb. 673, 235 N.W.2d 218 (1975); *State v. Oltjenbruns,* 187 Neb. 694, 193 N.W.2d 744 (1972).

In the case at bar Officer Knuth knew from her previous personal observation that what she reasonably believed to be a marijuana cigarette was in the ashtray of the pickup. When she later stopped the pickup and told the defendant she wanted to talk to him about the roach, the defendant's conduct and comments confirmed her observations and constituted probable cause for an arrest on a charge of possession of marijuana.

Since there was probable cause for arresting the defendant on a charge of possession of marijuana, this case is controlled by *New York v. Belton,* 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). The facts in that case are remarkably similar to those in the case at bar. The issue in *Belton* was whether, in the course of a search incident to the lawful custodial arrest of the occupants of an automobile, police may search inside the automobile after the arrestees are no longer in it. In *Belton* the Supreme Court held that when a police officer has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. The police officer may also examine the contents of any containers found within the passenger compartment. The Court's definition of "containers" includes glove compartments and bags such as are involved in the case at bar.

The finding of the District Court that the search of the pickup cab was not incident to a lawful custodial arrest was erroneous. Therefore, the order of the

District Court suppressing all contraband seized from the pickup must be reversed.

REVERSED.

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Abandonment.

Abandonment must be pled and proved, the burden of proof being on the party alleging it. Masid v. First State Bank 431

Abatement.

Where it appears that the vendor is unable to make a complete or perfect title, or that there is a deficiency in the quantity of land contracted to be sold, the general rule is that the vendee, if he so elects, is entitled to have the contract specifically performed to the extent of the vendor's ability to comply therewith and at the same time have a just abatement out of the purchase price for the deficiency of title, quantity, or quality of the estate to compensate for the vendor's failure to perform the contract in full. The measure of abatement should be such portion of the purchase price as the relative value of the land lost bears to the purchase price of the whole tract. Kuhlman v. Grimminger 64

Accounting.

1. An action for the dissolution of a partnership and an accounting between partners is one in equity and is reviewed in this court de novo on the record. Bass v. Dalton 360
2. Imposed upon the Nebraska Supreme Court in such a case is the duty to reach an independent conclusion without reference to the findings of the District Court, bearing in mind and according respect and weight to the trial court's superior position as the original finder of fact. Bass v. Dalton 360

Actions.

1. A petition in error is designed to review the decision of the inferior tribunal. It is not to act as a super legislative or administrative agency to come to an independent conclusion. Andrews v. City of Fremont 148
2. The pendency of another action does not ipso facto require that a demurrer be sustained. Miller v. Miller .. 219
3. Generally, the pendency of a former action for the same cause between the same parties and in the same court constitutes a good plea in abatement. Miller v. Miller 219

4. The general rule that pendency of a prior action between the same parties for the same cause may be pled in abatement of a subsequent action will not be sustained where the prior action is pending in a court of a foreign or different jurisdiction. Miller v. Miller 219

Administrative Agencies.

1. Where an administrative agency is charged with the responsibility of protecting the public interest as distinguished from determining the rights of two or more individuals in a dispute before such agency, it is a necessary party in any appellate proceeding. Leach v. Dept. of Motor Vehicles 103
2. An "appeal" from an order of the director of the Department of Motor Vehicles under Neb. Rev. Stat. § 60-420 (Reissue 1978) or § 84-917(2) (Reissue 1981) is commenced or perfected by filing a petition within 30 days of the service of the final decision of the director and causing a summons to issue on the petition and be served within 6 months of such filing. Leach v. Dept. of Motor Vehicles 103
3. Making an administrative agency a party defendant in an appeal under the provisions of Neb. Rev. Stat. § 60-420 (Reissue 1978) or § 84-917(2) (Reissue 1981) is not an action against the State of Nebraska within the meaning of Neb. Rev. Stat. §§ 24-319 et seq. (Reissue 1979) so as to require service of summons upon the Governor and the Attorney General. Leach v. Dept. of Motor Vehicles 103
4. The failure of an administrative agency to prepare and transmit to the court a certified transcript of the proceedings had before it within 15 days after service of the petition, pursuant to Neb. Rev. Stat. § 84-917(4) (Reissue 1981), does not, in and of itself, entitle the party seeking review to have the agency's order set aside. Maurer v. Weaver 157
5. Where appeals are taken from an administrative agency to the District Court, pursuant to the provisions of Neb. Rev. Stat. § 84-917 (Reissue 1981), the certified transcript as prepared by the agency and transmitted to the court shall be considered to be before the court and shall, unless objected to by one of the parties, be considered without the need of either party formally offering the record into evidence. Maurer v. Weaver . 157

Administrative Hearings.

1. In an administrative hearing an agency may take notice of judicially cognizable facts and in addition take

notice of general, technical, or scientific facts within its specialized knowledge. However, parties to such hearings will be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed so as to be afforded an opportunity to contest the facts so noticed. In re Application of ATS Mobile Telephone 403

2. An agency may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it during any hearing. In re Application of ATS Mobile Telephone 403
3. Even though the method by which an administrative agency takes notice of facts not presented at the hearing may not be technically correct, if the parties had full and fair opportunity to address that subject by cross-examination or otherwise, they may very well not have been prejudiced or unfairly surprised by the notice of facts taken by the agency. In re Application of ATS Mobile Telephone 403
4. At a hearing on an application for a liquor license, the burden is upon the applicant to prove its fitness and willingness to provide the service proposed, its ability to conform to the rules of the Nebraska Liquor Control Act, that its management and control exercised over the premises will insure compliance with such rules and regulations, and that the issuance of the license is or will be required by the present or future public convenience and necessity. Although the Liquor Control Commission may consider the recommendation of the local governing body in determining whether or not to issue such license, the burden is not on the applicant to provide evidence of such recommendation. Kerrey's, Inc. v. Neb. Liquor Control Comm. 442
5. Where one appears before an administrative body and presents evidence or makes argument, the party so appearing cannot thereafter claim a denial of due process solely on the ground that proper notice of the hearing was not given. After appearing at the hearing the party is deemed to have waived any objection with regard to notice. Laubscher v. S.I.D. No. 20 834

Administrative Law.

1. Where factfindings under criteria in Neb. Rev. Stat. § 84-917(6)(e) (Reissue 1981) are involved, we review the decision of the District Court only to determine that it and the board have applied the proper criteria, and it is in this sense that we review de novo. Simonds v. Board of Examiners 259

2. The substantial evidence standard of review of decisions of administrative agencies requires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably find facts as it did. Simonds v. Board of Examiners 259
3. The Legislature may authorize an agency to make rules and regulations for the operation and enforcement of a law, such to be limited to rules within the express legislative purpose of the act and to be administered in accordance with standards expressed in the act. State v. Sprague 581
4. No unconstitutional delegation of authority occurs when the Legislature defines a crime and sets a penalty therefor, but delegates the implementation of details to an administrative agency. State v. Sprague 581
5. The manner and method of enforcing a law may be delegated, since of necessity this must be left to the reasonable discretion of administrative officers. State v. Sprague 581

Aiding and Abetting.

1. Aiding and abetting criminal dealings in controlled substances, whatever the motivation of an attorney may be, constitutes conduct involving moral turpitude and warrants disciplinary action. State ex rel. NSBA v. Matt 123
2. Where a defendant has knowledge that another is violating the law, or possesses information sufficient to place a reasonable person on inquiry as to the possibility that such violations are taking place, yet continues to furnish essential materials for the purpose of continuing such violations, he may be guilty of aiding and abetting such criminal activity. State v. Hilpert .. 576
3. The evidence is sufficient to convict a person as an aider and abettor if it shows that the crime was committed by someone and that the defendant incited or instigated, i.e., aided and abetted in, its commission. Such evidence may be circumstantial only, but if the facts which such evidence tends to establish may be accounted for upon no rational theory which does not include the guilt of the accused, it is sufficient to sustain a conviction. State v. Hilpert 576

Appeal and Error.

1. The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld in the absence of an abuse of discretion. State v. Jones 1

2. The trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding. Potts v. Board of Equalization 37
Beynon Farm Products v. Bd. of Equalization 815
3. Upon an appeal from an order of the Public Service Commission, this court may decide only whether the commission acted within the scope of its authority and whether the order was based on evidence which shows that such order was not unreasonable or arbitrary. In re Application of Crusader Coach Lines 53
4. It is not the province of this court to weigh or resolve conflicts in the evidence or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission, but will sustain the action of the commission if there is evidence in the record to support it. In re Application of Crusader Coach Lines 53
In re Application of ATS Mobile Telephone 403
5. The issue of public convenience and necessity is ordinarily one of fact, and where there is evidence in the record to sustain the Public Service Commission's order, this court cannot say that it is unreasonable and arbitrary. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Public Service Commission. In re Application of Crusader Coach Lines 53
6. This court will not interfere with a jury verdict of guilty based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Brown 68
State v. Holland 170
State v. Hilpert 564
State v. Hellbusch 894
7. The review in this court of the assessment of railroad operating property made by the State Board of Equalization and Assessment is de novo on the record. In re Assessment of OL&B Ry. Co. 71
8. A challenge to a spouse's statutory election to take against a will is tried in this court de novo on the record. In re Estate of Carman 98
9. Where an administrative agency is charged with the responsibility of protecting the public interest as distinguished from determining the rights of two or more individuals in a dispute before such agency, it is a necessary party in any appellate proceeding. Leach v. Dept. of Motor Vehicles 103

10. An "appeal" from an order of the director of the Department of Motor Vehicles under Neb. Rev. Stat. § 60-420 (Reissue 1978) or § 84-917(2) (Reissue 1981) is commenced or perfected by filing a petition within 30 days of the service of the final decision of the director and causing a summons to issue on the petition and be served within 6 months of such filing. Leach v. Dept. of Motor Vehicles 103
11. Making an administrative agency a party defendant in an appeal under the provisions of Neb. Rev. Stat. § 60-420 (Reissue 1978) or § 84-917(2) (Reissue 1981) is not an action against the State of Nebraska within the meaning of Neb. Rev. Stat. §§ 24-319 et seq. (Reissue 1979) so as to require service of summons upon the Governor and the Attorney General. Leach v. Dept. of Motor Vehicles 103
12. In reviewing criminal cases this court will not set aside the judgment of the trial court if there is sufficient evidence, taking the view most favorable to the State, to support the judgment. State v. Schmidt 126
13. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.
State v. Schmidt 126
State v. Komor 376
State v. Hilpert 564
State v. Isherwood 592
State v. Sims 708
State v. Christensen 820
State v. Bromwich 827
State v. Hellbusch 894
14. In the absence of a bill of exceptions it is presumed that the evidence sustained the findings of the trial court. The only issue that can be considered is whether the pleadings support the judgment. Caynor v. Caynor ... 143
Snyder v. Nelson 605
State v. Manchester 670
15. Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will the Supreme Court. Andrews v. City of Fremont 148
16. New evidence is not permitted in the appellate court to determine if errors of law occurred in the tribunal giving rise to the error proceeding. Andrews v. City of Fremont 148
17. The giving of an incorrect instruction which may have affected the result unfavorably to the party complaining constitutes reversible error. In re Estate of Flider 153
18. The failure of an administrative agency to prepare and

transmit to the court a certified transcript of the proceedings had before it within 15 days after service of the petition, pursuant to Neb. Rev. Stat. § 84-917(4) (Reissue 1981), does not, in and of itself, entitle the party seeking review to have the agency's order set aside. Maurer v. Weaver 157

19. Where appeals are taken from an administrative agency to the District Court, pursuant to the provisions of Neb. Rev. Stat. § 84-917 (Reissue 1981), the certified transcript as prepared by the agency and transmitted to the court shall be considered to be before the court and shall, unless objected to by one of the parties, be considered without the need of either party formally offering the record into evidence. Maurer v. Weaver 157

20. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. The decision of the compensation court after rehearing must be considered in the light most favorable to the successful party, and every controverted fact must be decided in its favor. Noah v. Creighton Omaha Health Care Corp. .. 169
Caradori v. Frontier Airlines 513

21. The defendant may not predicate error on the admission of evidence to which no objection was made when adduced. State v. Holland 170

22. Where evidence is conflicting or where reasonable minds may draw different inferences or conclusions from the evidence, it is within the province of the jury to decide the issues of fact, and the Supreme Court will not set aside or direct a verdict in such a situation. Koerner v. Perrella 189
Holly v. Mitchell 203

23. Instructions should be considered together, and if, when considered as a whole, they correctly state the law, error cannot be predicated thereon. Holly v. Mitchell 203

24. An appeal to the District Court from an order or decision of the human rights commission of a city of the primary class in an employment discrimination case is heard as in equity and without a jury. American Stores v. Jordan 213

25. In an appeal in an equity action it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the District Court. American Stores v. Jordan 213
Masid v. First State Bank 431

26. To sustain a charge of discrimination in employment where there is no charge of a universal discriminatory practice or system, complainant, in the record, must establish that the employer intentionally engaged in acts that discriminated against complainant in violation of the statutory prohibitions. American Stores v. Jordan 213
27. An appellee can not cross-appeal against another appellee. Maricle v. Spiegel 223
28. Generally, a proper objection to the receipt of evidence is required to preserve for review any error in the overruling of a motion in limine. Maricle v. Spiegel 223
29. A defendant can not predicate error on the denial of a motion in limine when his objection to the evidence was sustained. Maricle v. Spiegel 223
30. The admission or rejection of photographs in evidence is largely within the discretion of the trial court. In the absence of a showing of an abuse of discretion, error may not be predicated upon such a ruling. Maricle v. Spiegel 223
31. A verdict will not be set aside unless it is against the weight of the evidence, or appears to have been the result of passion, prejudice, mistake, or disregard of the rules of evidence or the law. Maricle v. Spiegel 223
32. A jury verdict will not be disturbed on appeal unless it is clearly erroneous. Maricle v. Spiegel 223
Schroll v. Fulton 310
33. In the absence of some evidence of arbitrary behavior or bad faith, courts will not substitute their judgment for the necessarily discretionary judgment of a school or university as to a student's educational performance. State ex rel. Mercurio v. Board of Regents 251
34. Where factfindings under criteria in Neb. Rev. Stat. § 84-917(6)(e) (Reissue 1981) are involved, we review the decision of the District Court only to determine that it and the board have applied the proper criteria, and it is in this sense that we review de novo. Simonds v. Board of Examiners 259
35. The substantial evidence standard of review of decisions of administrative agencies requires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably find facts as it did. Simonds v. Board of Examiners 259
36. The court must accept the facts as set forth in the petition and may not notice or consider extrinsic matters in determining whether a pleading states a cause of action. Heinzman v. County of Hall 268

37. It is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. Schroll v. Fulton 310
38. The findings of fact made by the District Court in an action under the Political Subdivisions Tort Claims Act will not be disturbed on appeal unless clearly wrong. Richards v. Douglas County 313
39. An action for the dissolution of a partnership and an accounting between partners is one in equity and is reviewed in this court de novo on the record. Bass v. Dalton 360
40. Imposed upon the Nebraska Supreme Court in such a case is the duty to reach an independent conclusion without reference to the findings of the District Court, bearing in mind and according respect and weight to the trial court's superior position as the original finder of fact. Bass v. Dalton 360
41. The Nebraska Supreme Court has authority to reduce a sentence when it is excessive and would result in a substantial miscarriage of justice. State v. Komor 376
42. Only a sentence which is clearly excessive is to be reduced by the Nebraska Supreme Court. State v. Komor 376
43. An action to construe a trust indenture will be reviewed in this court de novo on the record. In re Testamentary Trust of Criss 379
44. A party who objects to testimony on a particular subject may not later claim that it was prejudiced because it had itself foreclosed inquiry into that subject matter. In re Application of ATS Mobile Telephone 403
45. The determination by the Public Service Commission as to whether the granting or rejecting of an application for service is within the public interest is a matter peculiarly within its expertise and involves a breadth of judgment and policy determination that will not be disturbed by this court in the absence of a showing that the action of the commission was illegal or arbitrary, capricious, or unreasonable. In re Application of ATS Mobile Telephone 403
46. The striking of the balance between the competing interests of legitimate competition and the protection of the public interest as to the authorization of services regulated by the Public Service Commission are matters of legislative and administrative determination peculiarly resting in the judgment of the commission. The determination of the public interest is one that is peculiarly for the determination of the commission,

and if there is evidence to sustain the finding this court cannot intervene. In re Application of ATS Mobile Telephone 403

47. If the record supports a decision by the Public Service Commission that an application for service should not be granted because the area proposed for the service is presently receiving or within a reasonable time will receive reasonably adequate service and that granting the application will create a duplication of facilities and is not in the interest of the public as provided by Neb. Rev. Stat. § 75-604 (Reissue 1981), the mere fact that the commission adds to its findings that to grant the particular application will unnecessarily extend the monopoly of the applicant to another area is not a necessary finding to justify the denial of such application; and although it may be an ill-advised statement, and as such objectionable, it does not constitute reversible error under the circumstances. In re Application of ATS Mobile Telephone 403

48. The findings of the District Court under the State Tort Claims Act will not be disturbed on appeal unless clearly wrong. Catania v. University of Nebraska 418

49. Where there is a conflict in the evidence, but there is believable evidence to support the findings of the District Court in a claim of this nature, those findings will be affirmed. Catania v. University of Nebraska 418

50. An appeal from the disallowance of a claim against a city of the primary class is perfected by filing a notice of appeal and bond as provided in Neb. Rev. Stat. § 15-841 (Reissue 1977). Cole Investment Co. v. City of Lincoln 422

51. This court will not disturb the District Court finding that an individual is a mentally disordered sex offender presently untreatable unless it can be said that there was no evidence upon which such conclusions could be based and that such declaration was an abuse of discretion. State v. Sell 437

52. In actions for the modification of dissolution proceedings, it is the duty of this court to review de novo the determination of the District Court with regard to whether a change in circumstances has occurred which justified the modification of the original decree. Albers v. Albers 471

53. In an appeal from property tax valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, or that its

value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Beynon v. Board of Equalization 488
54. All conflicts in the evidence and questions of the credibility of witnesses are for the jury to resolve; a jury verdict may not be set aside unless it is clearly wrong. Flakus v. Schug 491
55. When a party has sustained the burden and expense of trial and has succeeded in securing the decision of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Flakus v. Schug 491
56. Consideration of assignments of error in this court is limited to those discussed in the brief. Flakus v. Schug 491
State v. Lamb 498
57. Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong. State v. Lamb 498
58. A determination by the trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong. State v. Lamb 498
59. A conviction will not be reversed because of the admission of evidence not prejudicial to the defendant. State v. Lamb 498
60. The action of the board under Neb. Rev. Stat. § 79-403 (Reissue 1981) is an exercise of a quasi-judicial power, equitable in character, and upon appeal from the District Court to this court the cause is triable de novo as in any other equitable action. In re Freeholder Petition 532
61. The determination of factual issues in a declaratory judgment action, which would otherwise be an action at law, will be treated in the same manner as if a jury had been waived, and hence a trial court's findings have the effect of a jury verdict and will not be set aside unless clearly wrong. Roth v. School Dist. of Scottsbluff 545
Quinn v. Godfather's Investments 665
62. The computing of damages and the finding that a teacher has properly mitigated damages under Neb. Rev. Stat. § 79-1254.07 (Reissue 1981) are factual issues, and the findings of the trial court in this regard will not be set aside unless clearly wrong. Roth v. School Dist. of Scottsbluff 545
63. Failure to file a cross-appeal precludes consideration in this court of errors claimed by appellee against appellant. Lord v. Lord 557

64. Assignments of error requiring an examination of the evidence are not available on appeal in the absence of a bill of exceptions, the bill of exceptions being the only vehicle for bringing evidence to this court. This remains so even though certain evidence has been physically filed in the office of the clerk of the trial court. Snyder v. Nelson 605
65. This court will not interfere on appeal with a final order made by the District Court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof. State v. Simants 638
66. Delaying the right of appeal beyond a commitment for evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981) and until a final sentence is pronounced does not violate article I, § 23, of the Nebraska Constitution, which grants to everyone in a felony case the right to appeal to the Supreme Court. Kaba v. Fox 656
67. The general rule is that the admissiblity of physical evidence rests in the discretion of the trial court, and the determination of admissibility will not be overturned unless there is a clear abuse of discretion. State v. Manchester 670
68. Opening and closing statements must appear in the bill of exceptions before alleged errors concerning them can be reviewed. State v. Manchester 670
69. An order denying probation and a sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge. State v. Patterson 686
70. Error may not be predicated upon a ruling which excludes evidence unless a substantial right of a party is affected. State v. Sims 708
71. It is uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to specific acts so alleged and supported. The failure to do so, even though not requested, is error. Enyeart v. Swartz 732
72. Ordinarily, a failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection thereafter. Enyeart v. Swartz 732
73. Noncompliance by counsel with the requirement that he object to a proposed jury instruction when it is submitted to him does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice. Enyeart v. Swartz 732

74. An order vacating a default judgment is an appealable order. Vacca v. DeJardine 736
75. Factual support in the record in the trial court as to "good cause" for failure to comply with statutory child placement preference directives are necessary for appropriate appellate review. In re Interest of Bird Head 741
76. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. Farmers Co-Op Assn. v. Boone County 763
77. The review of a collateral attack upon a special assessment is a proceeding in equity, which this court reviews de novo on the record. Reiser v. Hartzler 802
78. When a court considers a sentence for a convicted offender, it shall, among other things, consider the offender's delinquency and criminal history. State v. Christensen 820
79. The admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant. State v. Bromwich 827
80. It is well settled that the judgment of the District Court is presumed correct, and the party assailing same has the burden of pointing out specifically the rulings of which he complains and the mistakes made by the court. State v. Bromwich 827
81. This court reviews cases regarding unemployment benefits de novo on the record and will retry all issues of fact and reach an independent conclusion. Stuart v. Omaha Porkers 838
82. The determination of whether there has been an abuse of discretion by the trial court in failing to set aside a default judgment must be made in light of the facts and circumstances of each case. Lincoln Welding Supply v. Inhalation Plastics 862
83. Among the factors to be considered in determining whether there has been an abuse of discretion in refusing to set aside a default judgment are those of the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceed-

ings in the administration of justice. Lincoln Welding Supply v. Inhalation Plastics 862
84. Generally, in the absence of an offer of proof no error may be predicated upon the court's ruling in excluding testimony. Morris v. Laaker 868

Appeal Bonds.

1. Where an appeal bond is given within the proper time, even if defective, the court has obtained jurisdiction, and the proper procedure is for the adverse party to move to compel the appellant to give a proper bond in an amount and conditioned as required by law. Stigge v. Graves 847
2. If the appellant fails to comply with an order requiring that a new or amended bond be furnished, the appeal may be dismissed. Stigge v. Graves 847
3. The filing of an appeal bond is a "proceeding" as used in Neb. Rev. Stat. §§ 25-852 and 25-853 (Reissue 1979), and the right to amend an appeal bond is within the purview of those sections. Stigge v. Graves 847

Arson.

1. Under Neb. Rev. Stat. § 28-502 (Reissue 1979), arson in the first degree does not require proof that some part of the building was ignited. It is sufficient if the evidence shows there was some damage to the building. State v. Hohnstein 296
2. The fact that a building was constructed of nonflammable materials does not prevent proof of first degree arson under Neb. Rev. Stat. § 28-502 (Reissue 1979), since it is only necessary to show that some damage to the building resulted from the fire. State v. Hohnstein 296
3. In order to establish the corpus delicti in an arson case, it is necessary that the evidence disclose the burning of the property as charged and that the burning was caused by the willful act of some person criminally responsible. State v. Workman 479

Assessments.

1. The review in this court of the assessment of railroad operating property made by the State Board of Equalization and Assessment is de novo on the record. In re Assessment of OL&B Ry. Co. 71
2. The burden of showing the assessment was improper is on the complaining party. In re Assessment of OL&B Ry. Co. 71

Banks and Banking.

1. A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it. Neb. U.C.C. § 3-409(1) (Reissue 1980). Galyen Petroleum Co. v. Hixson 683
2. A check, of itself, and in the absence of special circumstances, is neither a legal nor an equitable assignment or appropriation of a corresponding amount of the drawer's funds in the hands of the drawee, and it gives the holder of the check no right of action against the drawee, even though the drawer has on deposit sufficient funds to pay it. Galyen Petroleum Co. v. Hixson 683

Blood, Breath, and Urine Tests.

1. Neb. Rev. Stat. § 39-669.09 (Reissue 1978) does not require the officer to inform the person to be tested of his privilege to request an independent test. State v. Miller 274
2. The use of an anticoagulant as a preservative for a blood sample is not a foundational requirement for the admission of evidence relating to test results, and the failure to use an anticoagulant goes only to the weight and credibility of the evidence. State v. Miller 274

Breach of Contract.

An insurer is precluded from asserting a forfeiture where, after acquiring knowledge of the facts constituting a breach of condition, it has retained the unearned portion of the premium or has failed to return or tender it back with reasonable promptness, especially where the nature of the breach or ground for forfeiture is of such character as to render the policy void from its inception. Dairyland Ins. Co. v. Kammerer 108

Brokers.

1. Where a broker and the owner of a business enter into a brokerage agreement which contains an extension clause entitling the broker to the payment of a commission in the event a sale occurs after termination of the brokerage agreement, but during the extension period, to any prospect solicited by the broker during the contract period, the broker must show some minimal causal connection between the efforts of the broker and the ultimate sale before the broker may receive the compensation. Chapman Co. v. Western Neb. Broadcasting 322

2. The measure of damages for the loss caused by the negligence of the broker is the amount that would have been due under the policy if it had been obtained by the broker. Nebraska Truck Serv. v. U.S. Fire Ins. Co. ... 755
3. Under the provisions of Neb. Rev. Stat. § 81-885.24(14) (Reissue 1981), a real estate broker or salesperson will be considered to know of a prior listing contract if he has actual knowledge of it or if he had actual knowledge of facts that would cause a reasonably prudent person to believe such a contract existed. Hancock v. State ex rel. Real Estate Comm. 807
4. A finding that a real estate salesperson "should have known that there was a possibility" of a prior listing contract does not meet the standard of knowledge required by Neb. Rev. Stat. § 81-885.24(14) (Reissue 1981). Hancock v. State ex rel. Real Estate Comm. 807

Case Disapproved.

To the extent that *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), held that strict liability in tort may not be used to recover for physical harm to property only, it is disapproved. National Crane Corp. v. Ohio Steel Tube Co. 782

Case Overruled.

1. To the extent that the holding in *A. Borchman Sons v. Carpenter*, 166 Neb. 322, 89 N.W.2d 123 (1958), is understood to provide that both members of nonstriking unions and nonunion employees who may ultimately benefit by reason of a strike called by another union are disqualified from receiving unemployment compensation under the provision of Neb. Rev. Stat. § 48-628(d) (Reissue 1978), even though they are not directly involved in the work stoppage, it is overruled. Gilmore Constr. Co. v. Miller 133
2. At an enhancement proceeding, a defendant's objection to the reception in evidence of a transcript of a former conviction which fails to show on its face that counsel was afforded or the right waived does not constitute a collateral attack on such prior conviction. To the extent that *State v. Orosco*, 199 Neb. 532, 260 N.W.2d 303 (1977), and *State v. Voight*, 206 Neb. 829, 295 N.W.2d 112 (1980), conflict with this holding, they are overruled. State v. Smith 446

Child Custody.

1. The best interests of the children are the primary con-

cern in the determination of custody and visitation matters. Caynor v. Caynor 143
2. While it is true that a parent has a natural right to the custody of his child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances. The welfare of a child of tender years is paramount to the wishes of the parent where it has formed a natural attachment for persons who have long been in the relation of parents with the parents' approval and consent. Nye v. Nye 364
3. It may be said that a natural parent, who by reason of past conduct and defaults has made it necessary to place a minor child in a situation where such child has formed a natural attachment for persons standing in a parental relationship, has approved of and consented to such relationship and has forfeited his or her natural rights to custody. Nye v. Nye 364
4. Factual support in the record in the trial court as to "good cause" for failure to comply with statutory child placement preference directives are necessary for appropriate appellate review. In re Interest of Bird Head 741

Child Support.

This court does not have authority to reduce past due installments of child support. This is not to say, however, that it may not find in a proper case that a party is estopped from collecting installments accruing after some affirmative action which would ordinarily terminate future installments. Scully v. Scully 857

Circumstantial Evidence.

1. One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence established guilt beyond a reasonable doubt. State v. Workman 479
2. One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt. State v. Patterson 686

Civil Rights.

1. An appeal to the District Court from an order or decision of the human rights commission of a city of the primary class in an employment discrimination case is heard as in equity and without a jury. American Stores v. Jordan 213
2. To sustain a charge of discrimination in employment

where there is no charge of a universal discriminatory practice or system, complainant, in the record, must establish that the employer intentionally engaged in acts that discriminated against complainant in violation of the statutory prohibitions. American Stores v. Jordan 213

Claims.

An appeal from the disallowance of a claim against a city of the primary class is perfected by filing a notice of appeal and bond as provided in Neb. Rev. Stat. § 15-841 (Reissue 1977). Cole Investment Co. v. City of Lincoln 422

Class Actions.

A petition which contains no facts from which it can be concluded that it is impracticable to bring all of the parties before the court fails to state a necessary predicate for a class action. Roadrunner Development v. Sims 649

Collateral Attack.

1. A judgment which is not void is not subject to collateral attack, but a void judgment may be attacked at any time in any proceeding. Lammers Land & Cattle Co. v. Hans 243
2. A sale of real estate to satisfy a dormant judgment is, as to the judgment debtor, voidable only and cannot be attacked in collateral proceedings. Lammers Land & Cattle Co. v. Hans 243
3. At an enhancement proceeding, a defendant's objection to the reception in evidence of a transcript of a former conviction which fails to show on its face that counsel was afforded or the right waived does not constitute a collateral attack on such prior conviction. To the extent that *State v. Orosco*, 199 Neb. 532, 260 N.W.2d 303 (1977), and *State v. Voight*, 206 Neb. 829, 295 N.W.2d 112 (1980), conflict with this holding, they are overruled. State v. Smith 446
4. Where the physical facts are such that real property was not and could not be specially benefited by an improvement project, the assessment levied to pay for such improvement may be held to be arbitrary, constructively fraudulent, and therefore void and subject to collateral attack. Reiser v. Hartzler 802
5. To sustain a collateral attack on a special assessment, it is necessary that the evidence support a determination that in fact the property in question was not and

could not be specially benefited by the particular improvement. Reiser v. Hartzler 802
6. Mere excessiveness of a special assessment may not be corrected in a collateral attack upon the assessment. Reiser v. Hartzler 802

Collateral Estoppel.

1. The principle of collateral estoppel may bar a party from raising a defense he might otherwise have. Lammers Land & Cattle Co. v. Hans 243
2. It is now generally held that collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action. Cedars Corp. v. Sun Valley Development Co. 622

Colleges and Universities.

In the absence of some evidence of arbitrary behavior or bad faith, courts will not substitute their judgment for the necessarily discretionary judgment of a school or university as to a student's educational performance. State ex rel. Mercurio v. Board of Regents 251

Comprehensive Development Plans.

A comprehensive development plan is merely a policy statement that may be implemented by a zoning resolution. It is the zoning resolution which has the force of law. If there is a conflict between a comprehensive plan and a zoning ordinance, the zoning ordinance contains the controlling provisions when questions of a citizen's property rights are at issue. Omaha Fish & Wildlife v. Community Refuse 234

Confessions.

1. Voluntary statements made while an individual is in custody but which are not the product of police interrogation are admissible at trial. State v. Parsons 349
2. Generally, statements made in a conversation initiated by the accused are not the results of interrogation and are admissible. State v. Lamb 498
3. Intoxication is not conclusive on the issue of the voluntariness of a statement. State v. Lamb 498
4. A determination by the trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong. State v. Lamb 498

5. Spontaneous statements made by the defendant, even after counsel has been requested, if not induced by the police or if made during conversations not initiated by the officers, are not "interrogation." The defendant must be subjected to "interrogation" in order for the right to counsel to come into play. State v. Lamb 498

Conspiracy.

1. In determining whether a conspiratorial agreement exists, the defendant's conduct subsequent to the agreement and the circumstances surrounding the agreement may be considered by the jury. State v. John ... 76
2. The function of the overt act in a charge of conspiracy is simply to manifest that the conspiracy is still at work. State v. John 76
3. Under the provisions of Neb. Rev. Stat. § 28-202 (Reissue 1979), a person may be convicted of a conspiracy to solicit the commission of murder even though the person with whom he conspired feigned agreement and at no time intended to go through with the plan. State v. John 76
4. Under the provisions of Neb. Rev. Stat. § 28-202 (Reissue 1979), an overt act done is an outward act done in pursuance of the conspiracy and manifests an intent or design looking toward the accomplishment of the crime. It need not of itself have a tendency to accomplish the object of the conspiracy and need not be an act which is criminal in itself. State v. John 76

Constitutional Law.

1. Ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established. State v. Davison 173
2. A classification having some reasonable basis does not offend against the equal protection clause of the fourteenth amendment merely because it is not made with mathematical nicety or because in practice it results in some inequality. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. State v. Davison 173
3. Under the U.S. Constitution, one must first establish a property interest in a position in order to establish procedural due process rights in a dismissal from employment. Heinzman v. County of Hall 268
4. The establishment of a property interest in employment requires a legitimate claim of entitlement to it that stems from an independent source such as state

law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Heinzman v. County of Hall 268
5. There is no constitutional prohibition against the assessment of a governmental subdivision for special benefits conferred upon its realty as the result of improvements created by an appropriate governing authority. Easley v. City of Lincoln 450
6. A statute proscribing otherwise free speech activity which "harasses" others, without setting forth standards comprising such harassment, is constitutionally infirm as vague because it impermissibly delegates to others, indiscriminately, the resolution, on an ad hoc and subjective basis, of the meaning of such term. Fowler v. Neb. Account. and Disclosure Comm. 462
7. The constitutional requirement that statutory language must be reasonably certain or be held void for vagueness is satisfied by the use of ordinary terms which find adequate interpretation in common usage and understanding. Roth v. School Dist. of Scottsbluff 545
8. A person to whom a statute may be constitutionally applied will not be heard to challenge the statute on the ground that it might conceivably be applied unconstitutionally to others in situations not before the court. State v. Sprague 581
9. The general rule regarding prosecutorial discretion in law enforcement is that, unless there is proof that a particular prosecution was motivated by an unjustifiable standard based, for example, on race or religion, the use of such discretion does not violate constitutional protections. State v. Sprague 581
10. The Legislature may authorize an agency to make rules and regulations for the operation and enforcement of a law, such to be limited to rules within the express legislative purpose of the act and to be administered in accordance with standards expressed in the act. State v. Sprague 581
11. No unconstitutional delegation of authority occurs when the Legislature defines a crime and sets a penalty therefor, but delegates the implementation of details to an administrative agency. State v. Sprague 581
12. The manner and method of enforcing a law may be delegated, since of necessity this must be left to the reasonable discretion of administrative officers. State v. Sprague 581
13. That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination

is founded upon a reasonable distinction or difference in state policy. State v. Sprague 581
14. It has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the equal protection clause of the fourteenth amendment if any state of facts reasonably can be conceived that would sustain it. State v. Sprague 581
15. Equal protection does not require that all persons be treated identically. It only requires that a distinction drawn by the Legislature between individuals has some relevance to the purpose for which the classification is made. State v. Simants 638
16. There is a rational basis for treating mentally ill dangerous persons who have been acquitted of a crime by reason of insanity differently than other mentally ill dangerous persons who have not. State v. Simants 638
17. Neb. Rev. Stat. §§ 29-3701 et seq. (Cum. Supp. 1982), insofar as they apply only to persons acquitted of crime by reason of insanity, are constitutional and do not violate the constitutional right of equal protection of the laws. State v. Simants 638
18. Delaying the right of appeal beyond a commitment for evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981) and until a final sentence is pronounced does not violate article I, § 23, of the Nebraska Constitution, which grants to everyone in a felony case the right to appeal to the Supreme Court. Kaba v. Fox 656
19. A delay in sentencing of 90 days pending a court-imposed evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981) is not such a delay as to be violative of the sixth amendment right to a speedy trial. Kaba v. Fox 656
20. The accused may waive his right of confrontation, and the waiver of this right may be accomplished by the accused's counsel as a matter of trial tactics or strategy. State v. Bromwich 827
21. Counsel in a criminal case may waive his client's fourteenth amendment right of the U.S. Constitution of confrontation by stipulating to the admission of evidence as a legitimate trial tactic. State v. Bromwich 827

Construction Contracts.

In general, where a construction contractor follows plans and specifications supplied by the owner which later prove to be defective or insufficient, he is not responsible to the owner for loss or damage resulting therefrom as a consequence of the defectiveness or insufficiency

of such plans and specifications. Langel Chevrolet-Cadillac v. Midwest Bridge 283

Contempt.

In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of the purposes for which the order was entered. General Motors Acceptance Corp. v. Fritz 760

Contracts.

1. Where it appears that the vendor is unable to make a complete or perfect title, or that there is a deficiency in the quantity of land contracted to be sold, the general rule is that the vendee, if he so elects, is entitled to have the contract specifically performed to the extent of the vendor's ability to comply therewith and at the same time have a just abatement out of the purchase price for the deficiency of title, quantity, or quality of the estate to compensate for the vendor's failure to perform the contract in full. The measure of abatement should be such portion of the purchase price as the relative value of the land lost bears to the purchase price of the whole tract. Kuhlman v. Grimminger 64
2. Contracts of insurance, like other contracts, are to be construed according to the meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms will be taken and understood in plain, ordinary, and popular sense. Johnsen v. Harper 145
3. A party seeking specific performance of an oral contract upon the basis of part performance must prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in part performance were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract, and further that nonperformance by the other party would amount to a fraud upon the party seeking specific performance. Yates v. Grosh 164
4. A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive. Pearce v. ELIC Corp. 193
5. Conditions precedent in a contract may be waived. Pearce v. ELIC Corp. 193
6. A provision in a written contract that a waiver of the

conditions and terms of the agreement must be in writing may be waived by acts or conduct. Pearce v. ELIC Corp. 193
7. The general rule is that the assertion of the invalidity of a contract is nullified by the subsequent acceptance of benefits growing out of the contract claimed to have been breached. Pearce v. ELIC Corp. 193
8. Where a contracting party, with knowledge of a breach by the other party, receives money in the performance of the contract, he will be held to have waived the breach. Pearce v. ELIC Corp. 193
9. A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration; and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof. Pearce v. ELIC Corp. 193
10. The parol evidence rule relates only to agreements made prior to or contemporaneous with the written agreement and does not apply to parol agreements made after a written agreement. Pearce v. ELIC Corp. 193
11. Generally, control, or the right of control, is the chief criterion in determining whether someone acts as an independent contractor. Maricle v. Spiegel 223
12. Words used in a contract must be given their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. Bass v. Dalton 360
13. A contract must be viewed as a whole. Bass v. Dalton 360
14. Courts are not free to interpret contracts which are couched in clear and unambiguous language; parties are bound by the terms of a contract even though their intent may be different from that expressed by the agreement. Bass v. Dalton 360
15. The essential elements required to sustain an action for damages as the result of fraud are that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else was made recklessly; that the misrepresentation was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and that such party did, in fact, rely upon the misrepresentation and was induced thereby to act to his injury or damage. Flakus v. Schug 491
16. A disclaimer clause is relevant in determining whether a claimant relied on the false representation disclaimed in the clause; however, the disclaimer is ineffective to preclude the trier of fact from considering

whether fraud induced formation of the bargain. Flakus v. Schug 491
17. Generally, where there has been a misrepresentation in the sale of real estate, the measure of damages is the cost of placing the property conveyed in the condition represented, not exceeding the difference in value of the property conveyed and the value of the property if it had been as represented. Flakus v. Schug 491
18. If a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects. Nekuda v. Vincent 527
19. If the defects cannot be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between its value as constructed and what its value would have been if built according to the contract. Nekuda v. Vincent 527
20. Parol evidence is not admissible to add to, contradict, or vary the terms of a written contract. Silverman v. Arbor Street Partnership 628
21. Where negotiations between the parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity. Silverman v. Arbor Street Partnership 628
22. The "estimated cost" of a building is its reasonable cost, erected in accordance with plans and specifications, and is not necessarily the amount agreed upon by the parties nor an offer to be accepted; it does not imply absolute calculation, but precludes accuracy. Ruzicka v. Petersen 642
23. Where services are furnished to a party and knowingly accepted by him, the law implies a promise to pay their reasonable value. Ruzicka v. Petersen 642
24. A provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one. Quinn v. Godfather's Investments 665
25. In interpreting a written contract, the meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had reason to know would be given to the words by the other party. Quinn v. Godfather's Investments 665
26. If it can be plainly seen from all the provisions of the instrument taken together that the obligation in ques-

tion was within the contemplation of the parties when making their contracts or is necessary to carry their intention into effect, the law will imply the obligation and enforce it. Quinn v. Godfather's Investments 665

27. The general measure of damages for a breach of contract to convey land is the market value at the time of breach less the contract price. Kerrey Constr. Co. v. Hunt 776

28. Where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made. Kerrey Constr. Co. v. Hunt 776

29. Under the provisions of Neb. Rev. Stat. § 81-885.24(14) (Reissue 1981), a real estate broker or salesperson will be considered to know of a prior listing contract if he has actual knowledge of it or if he had actual knowledge of facts that would cause a reasonably prudent person to believe such a contract existed. Hancock v. State ex rel. Real Estate Comm. 807

30. A finding that a real estate salesperson "should have known that there was a possibility" of a prior listing contract does not meet the standard of knowledge required by Neb. Rev. Stat. § 81-885.24(14) (Reissue 1981). Hancock v. State ex rel. Real Estate Comm. 807

Conveyances.

An action in the form of a creditor's bill or to set aside a conveyance in fraud of creditors cannot generally be founded upon a dormant judgment. Lammers Land & Cattle Co. v. Hans 243

Convictions.

A conviction will not be reversed because of the admission of evidence not prejudicial to the defendant. State v. Lamb 498

Corporations.

1. Under the venue statutes, a nonresident defendant corporation "may be found" in any county within the state in which proper service can be had upon its agent. Mittelstadt v. Rouzer 178

2. Jurisdiction over a foreign corporation may be exercised by consent of such corporation. Mittelstadt v. Rouzer 178

3. By designating an agent upon whom process may be served within this state, a defendant has consented to

the jurisdiction in personam by the proper court. Mittelstadt v. Rouzer 178
4. The validity of service under the Motor Carrier Act, 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. § 10330(b) (Supp. IV 1980)), is not limited to causes of action arising out of commerce transacted by a foreign corporation within the state because the act deals with jurisdiction of the person. Mittelstadt v. Rouzer 178
5. By appointing a resident agent for service as required by the Motor Carrier Act, 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. § 10330(b) (Supp. IV 1980)), a nonresident corporation has consented to jurisdiction within this state at least as to any cause of action arising out of its activities as a motor carrier in interstate commerce. Mittelstadt v. Rouzer 178
6. Generally, "book value" of the stock in a corporation means the figure obtained by dividing the difference between assets and liabilities by the number of outstanding shares of stock. Smith v. Fettin Roofing Co. . 184
7. Generally, there is a presumption that the acts of corporate officers pertaining to ordinary business transactions are authorized by the corporation. This presumption does not apply when an officer diverts or pledges corporate property as security for a personal debt. Val-U Constr. Co. v. Contractors, Inc. 291
8. When a corporate officer acts outside the scope of ordinary business, no presumption of authority arises and the other party to the transaction must make an inquiry into the officer's authority. Val-U Constr. Co. v. Contractors, Inc. 291

Costs.

1. Where each party obtains judgment against the other, each party should pay the costs of the other. Langel Chevrolet-Cadillac v. Midwest Bridge 283
2. The allowance of a guardian ad litem's fees and costs is discretionary and depends upon a consideration of all the facts and circumstances. Nye v. Nye 364
3. Ordinarily, the successful party is entitled to an award of costs, and it necessarily follows in such cases that payment of the same will be taxed to the unsuccessful party. Nye v. Nye 364

Courts.

1. Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will the Supreme Court. Andrews v. City of Fremont 148

2. Courts will not review or inquire into the legislative acts of municipal boards concerning matters within their power as to whether they acted expediently, wisely, or necessarily. Such are matters of pure legislative function, and not of judicial concern. Morrow v. City of Ogallala 414

Criminal Attempt.

1. Proof of the actual commission of an offense is sufficient to sustain a conviction for attempt. State v. Hohnstein 296
2. Attempted murder requires proof of conduct amounting to a substantial step toward commission of the crime and which is strongly corroborative of the necessary criminal intent. State v. Manchester 670
3. Solicitation of an innocent agent to kill the victim may be proof of conduct amounting to a substantial step toward commission of attempted murder. State v. Manchester 670
4. Proof that the defendant made plans for the murder, solicited a killer, discussed the contract price and set the money aside in his billfold, arranged for a weapon, and showed the killer the victim, his residence, and his place of work is sufficient evidence of conduct amounting to a substantial step toward commission of attempted murder in the first degree, and will support a finding of guilty. State v. Manchester 670
5. Abandonment is not a defense to criminal attempt in Nebraska. State v. Manchester 670
6. The value of goods stolen under Neb. Rev. Stat. §§ 28-510 et seq. (Reissue 1979) is a material or essential element of the crime of attempted theft in order to establish the gradation of the offense, and it must be proven beyond a reasonable doubt. State v. Redding .. 887
7. If the uncontroverted evidence supports a finding beyond a reasonable doubt of the attempted theft of but one item of property consisting of cash of a stated amount, the fact that a jury returns a verdict of guilty based upon instructions which failed to include specific value as a material element of the crime is harmless error. State v. Redding 887

Criminal Law.

1. The right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel. State v. Jones 1

2. The standard for determining whether or not counsel for defendant in a criminal prosecution has provided adequate representation requires that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client. State v. Jones 1
3. In order to be constitutionally adequate, the immunity granted by a state to a witness in a criminal case must afford protection to the witness extending to criminal proceedings by other states, or by the United States. State v. Jones 1
4. Constitutionally adequate statutory immunity must leave the witness and the federal government, or another state government, in substantially the same position as if the witness had claimed his constitutional privilege against self-incrimination, in the absence of a state grant of immunity. State v. Jones 1
5. The true test of the constitutionality of an immunity statute is whether the result under such a statute is the same as if the witness retained his fifth amendment right and did not testify. State v. Jones 1
6. In reviewing criminal cases this court will not set aside the judgment of the trial court if there is sufficient evidence, taking the view most favorable to the State, to support the judgment. State v. Schmidt 126
State v. Hellbusch 894
7. A prison inmate has no absolute constitutional right to be released from prison so that he can be present at a hearing in a civil action. Caynor v. Caynor 143
8. In the absence of a statute there is no authority requiring the appointment of counsel to represent an indigent prison inmate in a private civil matter. Caynor v. Caynor 143
9. The owner of chattels may testify as to their value in a criminal case. State v. Holland 170
10. In a criminal prosecution any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony. State v. Miller 274
11. A prisoner serving an Iowa sentence who is transferred to Nebraska pursuant to the Interstate Corrections Compact remains subject to the jurisdiction of Iowa. Falkner v. Neb. Board of Parole 474
12. A Nebraska parole violator who is serving an Iowa sentence imposed for a subsequent offense does not recommence serving his Nebraska sentence until he has been released from custody by Iowa and arrested for the

custody of the Nebraska Board of Parole. Falkner v. Neb. Board of Parole 474
13. To sustain a conviction for a crime, the corpus delicti must be proved beyond a reasonable doubt. State v. Workman 479
14. The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. State v. Lamb 498
15. Insanity as a defense must be shown to exist at the time of the offense. State v. Lamb 498
16. The fact that a defendant had some form of mental illness or defect does not by itself establish lack of responsibility. State v. Lamb 498
17. Evidence offered by one defendant in a joint trial, if competent, is evidence against other persons charged in the same information. State v. Hilpert 564
18. Where the requisite elements of a crime are committed in different jurisdictions, if an essential element of the crime is committed in this state, jurisdiction to prosecute is present. State v. Hilpert 564
State v. Manchester 670
19. Delaying the right of appeal beyond a commitment for evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981) and until a final sentence is pronounced does not violate article I, § 23, of the Nebraska Constitution, which grants to everyone in a felony case the right to appeal to the Supreme Court. Kaba v. Fox 656
20. A delay in sentencing of 90 days pending a court-imposed evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981) is not such a delay as to be violative of the sixth amendment right to a speedy trial. Kaba v. Fox 656
21. Absent bad faith and prejudice to the defendant, the action of the trial court with regard to alleged misconduct of the prosecutor will not be deemed an abuse of discretion. State v. Manchester 670
22. Posthypnotic testimony of a victim which relates to matters which such victim was able to recall and relate prior to the hypnosis and as to which there is sufficient reliable recorded evidence to satisfy the court that such facts were known and related by the victim prior to hypnosis is admissible at trial. State v. Levering 715
23. Direct evidence obtained by reason of hypnosis is inadmissible per se. State v. Patterson 686
24. The accused may waive his right of confrontation, and the waiver of this right may be accomplished by the ac-

cused's counsel as a matter of trial tactics or strategy. State v. Bromwich 827
25. Counsel in a criminal case may waive his client's fourteenth amendment right of the U.S. Constitution of confrontation by stipulating to the admission of evidence as a legitimate trial tactic. State v. Bromwich 827
26. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Bromwich 827

Damages.
1. Failure to plead mitigation of damages waives the defense. Maricle v. Spiegel 223
2. In general, where a construction contractor follows plans and specifications supplied by the owner which later prove to be defective or insufficient, he is not responsible to the owner for loss or damage resulting therefrom as a consequence of the defectiveness or insufficiency of such plans and specifications. Langel Chevrolet-Cadillac v. Midwest Bridge 283
3. Generally, where there has been a misrepresentation in the sale of real estate, the measure of damages is the cost of placing the property conveyed in the condition represented, not exceeding the difference in value of the property conveyed and the value of the property if it had been as represented. Flakus v. Schug 491
4. If a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects. Nekuda v. Vincent 527
5. If the defects cannot be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between its value as constructed and what its value would have been if built according to the contract. Nekuda v. Vincent 527
6. The computing of damages and the finding that a teacher has properly mitigated damages under Neb. Rev. Stat. § 79-1254.07 (Reissue 1981) are factual issues, and the findings of the trial court in this regard will not be set aside unless clearly wrong. Roth v. School Dist. of Scottsbluff 545
7. It is the duty of the District Court to refrain from sub-

mitting to a jury the issue of damages when the evidence is such that it cannot determine such issue except by indulging in speculation and conjecture. Raskin v. Seldin Dev. & Management Co. 729

8. The measure of damages for the loss caused by the negligence of the broker is the amount that would have been due under the policy if it had been obtained by the broker. Nebraska Truck Serv. v. U.S. Fire Ins. Co. ... 755
9. Damages, like any other element of plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove plaintiff's alleged damages. Nebraska Truck Serv. v. U.S. Fire Ins. Co. 755
10. It is fundamental that the plaintiff's burden to prove the nature and amount of damages cannot be sustained by evidence which is speculative and conjectural. Nebraska Truck Serv. v. U.S. Fire Ins. Co. 755
11. Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation. Nebraska Truck Serv. v. U.S. Fire Ins. Co. 755
12. The general measure of damages for a breach of contract to convey land is the market value at the time of breach less the contract price. Kerrey Constr. Co. v. Hunt 776
13. Where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made. Kerrey Constr. Co. v. Hunt 776
14. The doctrine of strict liability in tort may be used to recover damages to the defective product itself where the damage occurred as a result of a sudden, violent event and not as a result of an inherent defect that reduced the property's value without inflicting physical harm to the product. National Crane Corp. v. Ohio Steel Tube Co. 782

Debtors and Creditors.

An action in the form of a creditor's bill or to set aside a conveyance in fraud of creditors cannot generally be founded upon a dormant judgment. Lammers Land & Cattle Co. v. Hans 243

Decedents' Estates.

1. A challenge to a spouse's statutory election to take against a will is tried in this court de novo on the record. In re Estate of Carman 98

2. The combined effect of the statutory elective share and augmented estate concepts is intended to protect the surviving spouse of a decedent against donative inter vivos transfers by devices which would deprive the survivor of a "fair share" of the decedent's estate and at the same time prevent the surviving spouse from receiving more than such share by allowing the acceptance of certain transfers and insurance proceeds and also yet elect against the will. In re Estate of Carman . 98
3. In the absence of an express contract to compensate a spouse for extra and unusual services, no obligation to do so will be implied. In re Estate of Carman 98
4. A spouse's labor does not, absent a contract, become a contribution "in money's worth" such as to take one-half the value of jointly produced and acquired assets out of the computation of the augmented estate. In re Estate of Carman 98

Declaratory Judgments.

The determination of factual issues in a declaratory judgment action, which would otherwise be an action at law, will be treated in the same manner as if a jury had been waived, and hence a trial court's findings have the effect of a jury verdict and will not be set aside unless clearly wrong. Roth v. School Dist. of Scottsbluff 545
Quinn v. Godfather's Investments 665

Deeds.

The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance. Craig v. Kile 340

Default Judgments.

1. An order vacating a default judgment is an appealable order. Vacca v. DeJardine 736
2. The matter of the vacation of a default judgment rests in the sound discretion of the trial court, but this discretion is not an arbitrary one and it must be exercised reasonably. Vacca v. DeJardine 736
Lincoln Welding Supply v. Inhalation Plastics 862
3. In addition to the requirements of Neb. Rev. Stat. § 24-537 (Reissue 1979), a party seeking to vacate a default judgment must also tender an answer or other

proof disclosing a meritorious defense. Vacca v. DeJardine 736
4. Before imposing the sanction of entering a default judgment against a party who has failed to serve answers to interrogatories as provided by Neb. Rev. Stat. § 25-1267.44 (Reissue 1979), the court should first issue an order requiring such party to show cause why such default judgment should not be entered. Vacca v. DeJardine 736
5. The determination of whether there has been an abuse of discretion by the trial court in failing to set aside a default judgment must be made in light of the facts and circumstances of each case. Lincoln Welding Supply v. Inhalation Plastics 862
6. Among the factors to be considered in determining whether there has been an abuse of discretion in refusing to set aside a default judgment are those of the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceedings in the administration of justice. Lincoln Welding Supply v. Inhalation Plastics 862

Demurrer.

1. The pendency of another action does not ipso facto require that a demurrer be sustained. Miller v. Miller ... 219
2. Where laches of the plaintiff and the staleness of his claim are apparent from the petition, objection thereto may be taken by demurrer. Roadrunner Development v. Sims 649

Depositions.

If only part of a deposition of a witness is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts relevant to the issues and not introduced. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873

Directed Verdict.

1. When, upon a jury trial, a defendant at the conclusion of all the evidence moves for a directed verdict in his favor or for dismissal, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to plaintiffs, and plaintiffs are entitled to the benefit of all proper inferences which

can reasonably be deduced therefrom. Flakus v. Schug 491
Morris v. Laaker 868
2. Following a motion for a directed verdict at the close of the evidence of the State, the introduction of evidence thereafter by the defendant waives any error in the ruling or failure of ruling on the motion, although the defendant is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction. State v. Hilpert 564
State v. Hellbusch 894

Disciplinary Proceedings.
1. It is the obligation of this court in disciplinary proceedings to review the evidence de novo to determine if discipline should be imposed and, if it should, the extent thereof. State ex rel. NSBA v. Matt 123
2. Aiding and abetting criminal dealings in controlled substances, whatever the motivation of an attorney may be, constitutes conduct involving moral turpitude and warrants disciplinary action. State ex rel. NSBA v. Matt 123

Discrimination.
1. An appeal to the District Court from an order or decision of the human rights commission of a city of the primary class in an employment discrimination case is heard as in equity and without a jury. American Stores v. Jordan 213
2. To sustain a charge of discrimination in employment where there is no charge of a universal discriminatory practice or system, complainant, in the record, must establish that the employer intentionally engaged in acts that discriminated against complainant in violation of the statutory prohibitions. American Stores v. Jordan 213
3. The general rule regarding prosecutorial discretion in law enforcement is that, unless there is proof that a particular prosecution was motivated by an unjustifiable standard based, for example, on race or religion, the use of such discretion does not violate constitutional protections. State v. Sprague 581
4. That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. State v. Sprague 581
5. It has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the equal

protection clause of the fourteenth amendment if any state of facts reasonably can be conceived that would sustain it. State v. Sprague 581

Drunk Driving.

The record of a conviction used for enhancement purposes in a prosecution for third offense driving while intoxicated must show on its face a voluntary and intelligent waiver of the right to counsel or that the defendant was represented by counsel. State v. Vainiunas 800

Due Process.

Due process requires at a minimum that deprivation of property by adjudication be preceded by notice and the opportunity to be heard as is appropriate to the nature of the case. Masid v. First State Bank 431

Easements.

1. Prescriptive rights are not looked upon with favor and, generally, must be proved by clear, convincing, and satisfactory evidence. Masid v. First State Bank 431
   Biegert v. Dudgeon 617
2. The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full prescriptive period. Masid v. First State Bank 431
   Biegert v. Dudgeon 617
3. Where adjoining proprietors lay out an alley between their lands, each devoting a part of his land to that way or alley, which is used for the prescriptive period by the respective owners or their successors in title, neither can obstruct or close that part which is on his own land; and in these circumstances the mutual use of the whole of the alleyway is to be considered to be adverse to a separate and exclusive use by either. Masid v. First State Bank 431
4. Where a claimant has shown open, visible, continuous, and unmolested use for the prescriptive period, the use will be presumed to be under a claim of right. The burden then falls upon the owner of the servient estate to rebut that presumption by showing the use to be permissive. Masid v. First State Bank 431
5. Possession of land is notice to the world of the possessor's rights therein and of all interests which inquiry

of the possessor would have revealed. Masid v. First State Bank 431
6. Where one is put on inquiry, he is charged with notice of all facts as he would have learned by a reasonable inquiry. Masid v. First State Bank 431
7. Due process requires at a minimum that deprivation of property by adjudication be preceded by notice and the opportunity to be heard as is appropriate to the nature of the case. Masid v. First State Bank 431
8. The whereabouts of a possessor of land are known and as such he is entitled to personal notice of any proceeding which may affect his interest in that land. Masid v. First State Bank 431

Effectiveness of Counsel.

1. The standard for determining whether or not counsel for defendant in a criminal prosecution has provided adequate representation requires that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client. State v. Jones 1
State v. Pope 645
2. A defendant challenging competency of counsel has the burden to establish it. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions. State v. Pope 645
3. Acquiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not per se violative of the constitutional guarantees of effective assistance of counsel. State v. Pope 645

Eminent Domain.

1. An owner of real property shown to be familiar with the value of such land is a competent witness to testify as to its value for the use to which it is then being put, without additional foundation. However, in order to estimate its value for other purposes, the owner must, as any other witness, be shown to have an acquaintance with the property and be informed as to the state of the market. Langfeld v. Department of Roads 15
2. Evidence of the price at which other lands have been sold is admissible in evidence in condemnation proceedings on the question of damages where such evidence is predicated upon sufficient foundation to furnish a criterion for market or going value of the land condemned. Langfeld v. Department of Roads 15

3. Such lands must be shown to be similar or similarly situated to the land condemned and to have been sold at about the same time as the taking in the condemnation action. Langfeld v. Department of Roads 15
4. Whether the properties the subject of other sales are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court, which will not be interfered with unless abused. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, depend upon the location and character of the properties and the circumstances of the case. Langfeld v. Department of Roads 15
5. The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances. Langfeld v. Department of Roads 15

Employment Security Law.

1. To the extent that the holding in *A. Borchman Sons v. Carpenter*, 166 Neb. 322, 89 N.W.2d 123 (1958), is understood to provide that both members of nonstriking unions and nonunion employees who may ultimately benefit by reason of a strike called by another union are disqualified from receiving unemployment compensation benefits under the provision of Neb. Rev. Stat. § 48-628(d) (Reissue 1978), even though they are not directly involved in the work stoppage, it is overruled. Gilmore Constr. Co. v. Miller 133
2. Members of nonstriking unions and nonunion employees who are not participating in or financing or directly interested in a labor dispute which caused a work stoppage, and who do not belong to a grade or class of workers who, immediately before the commencement of the stoppage, were members employed at the premises at which the stoppage occurs and are participating in or financing or directly interested in the labor dispute, are not disqualified from receiving benefits under Neb. Rev. Stat. § 48-628(d) (Reissue 1978). Gilmore Constr. Co. v. Miller 133
3. This court reviews cases regarding unemployment benefits de novo on the record and will retry all issues of fact and reach an independent conclusion. Stuart v. Omaha Porkers 838
4. While the term "misconduct" is not specifically defined in Neb. Rev. Stat. § 48-628(b) (Reissue 1978), it has generally been defined to include behavior which evi-

dences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations. Stuart v. Omaha Porkers 838

Equal Protection.

1. Equal protection does not require that all persons be treated identically. It only requires that a distinction drawn by the Legislature between individuals has some relevance to the purpose for which the classification is made. State v. Simants 638
2. There is a rational basis for treating mentally ill dangerous persons who have been acquitted of a crime by reason of insanity differently than other mentally ill dangerous persons who have not. State v. Simants 638
3. Neb. Rev. Stat. §§ 29-3701 et seq. (Cum. Supp. 1982), insofar as they apply only to persons acquitted of crime by reason of insanity, are constitutional and do not violate the constitutional right of equal protection of the laws. State v. Simants 638

Equity.

1. In an appeal in an equity action it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the District Court. American Stores v. Jordan 213
2. A case in equity is reviewed in the Nebraska Supreme Court de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, we will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. Masid v. First State Bank .. 431
3. The review of a collateral attack upon a special assessment is a proceeding in equity, which this court reviews de novo on the record. Reiser v. Hartzler 802

Escape.

1. For the purpose of determining whether one has escaped, work release is but temporary leave within the meaning of Neb. Rev. Stat. § 28-912(1) (Reissue 1979). State v. Coffman 560
2. While on work release, under the provisions of Neb. Rev. Stat. §§ 83-183 and 83-184 (Reissue 1981), a

prisoner remains subject to the supervision, control, and custody of the Nebraska Penal and Correctional Complex. State v. Coffman 560

Estates.

1. It is the general rule that in the absence of a controlling equity, or of an express or implied provision in the will to the contrary, where an estate is given to a person for life with a vested remainder in another, the remainder takes effect in possession whenever the prior gift ceases or fails in whatever manner. In re Testamentary Trust of Criss 379
2. One of the primary incidents of ownership of property in fee simple is the right to convey or encumber it. It is the general rule that a testator may not create a fee simple estate to vest at his death and at the same time restrict its alienation. However, this is not to say that such testator may not, in some situations, create economic incentives in his will encouraging the retention of property, without violating the rule condemning restrictions on alienation. In re Testamentary Trust of Criss 379
3. As a general rule, when an attempted prior interest fails under a will because the person to whom it is limited renounces it, succeeding interests are accelerated, with certain minor exceptions. In re Testamentary Trust of Criss 379
4. A testator is presumed to know that his widow might elect to take her share of his estate as provided for by statute and renounce any interest under his will. In re Testamentary Trust of Criss 379
5. When a widow elects to take her "forced" or statutory share and renounce her interest under her husband's will, she may well be treated as having predeceased her husband, thereby taking no interest under the will. In re Testamentary Trust of Criss 379

Estoppel.

1. An insurer that gives one reason for its conduct and decision as to a matter involved in controversy cannot, after litigation has begun, depend upon another and different ground. Mutual Benefit Life Ins. Co. v. Chisholm 301
2. Equitable estoppel is based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there must be reliance in good faith upon statements or conduct of the party to be estopped and a change of po-

sition by the party claiming the estoppel to his injury, detriment, or prejudice. Scully v. Scully 857

Evidence.

1. The admission into evidence of gruesome photographs rests in the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. State v. Jones 1
2. Evidence of the price at which other lands have been sold is admissible in evidence in condemnation proceedings on the question of damages where such evidence is predicated upon sufficient foundation to furnish a criterion for market or going value of the land condemned. Langfeld v. Department of Roads 15
3. Such lands must be shown to be similar or similarly situated to the land condemned and to have been sold at about the same time as the taking in the condemnation action. Langfeld v. Department of Roads 15
4. Whether the properties the subject of other sales are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court, which will not be interfered with unless abused. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, depend upon the location and character of the properties and the circumstances of the case. Langfeld v. Department of Roads 15
5. Where the fact sought to be shown, even though independent of the fact being litigated, has an actual and substantial tendency to establish or disprove such fact, it must be admitted. Evidence is relevant not only when it tends to prove or disprove the precise fact in issue but when it tends to establish a fact from which the existence or nonexistence of the fact in issue can directly be inferred. Langfeld v. Department of Roads 15
6. The relative weight of conflicting evidence is necessarily determined by the credibility of the witnesses, which question is one solely for the jury which saw the witnesses and heard the testimony. State v. Brown ... 68
   Schroll v. Fulton 310
7. The jurors are the judges of the credibility of the witnesses and the weight to be given to the testimony, and they have the right to credit or reject the whole or any part of the testimony in the exercise of their judgment. State v. Brown 68
   Flakus v. Schug 491

8. The owner of chattels may testify as to their value in a criminal case. State v. Holland 170
9. The defendant may not predicate error on the admission of evidence to which no objection was made when adduced. State v. Holland 170
10. Where evidence is conflicting or where reasonable minds may draw different inferences or conclusions from the evidence, it is within the province of the jury to decide the issues of fact, and the Supreme Court will not set aside or direct a verdict in such a situation. Koerner v. Perrella 189
11. Where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff and the degree thereof when one is compared with the other, the issues must be submitted to the jury. Holly v. Mitchell 203
12. Generally, a proper objection to the receipt of evidence is required to preserve for review any error in the overruling of a motion in limine. Maricle v. Spiegel 223
13. A defendant can not predicate error on the denial of a motion in limine when his objection to the evidence was sustained. Maricle v. Spiegel 223
14. The admissibility of the speed of a vehicle shortly before a collision rests largely in the discretion of the trial court. Maricle v. Spiegel 223
15. The admission or rejection of photographs in evidence is largely within the discretion of the trial court. In the absence of a showing of an abuse of discretion, error may not be predicated upon such a ruling. Maricle v. Spiegel 223
16. Proof as to the tax consequences of a personal injury damages award is not admissible. Maricle v. Spiegel . 223
17. The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith. Neb. Rev. Stat. § 27-1004 (Reissue 1979). State ex rel. Mercurio v. Board of Regents 251
18. Secondary evidence of the contents of a writing, the original of which would have been competent evidence, may be admitted into evidence if it is shown by satisfactory proof that the originals have been lost or destroyed in the absence of bad faith, malice, or fraud. State ex rel. Mercurio v. Board of Regents 251
19. In the absence of some evidence of arbitrary behavior or bad faith, courts will not substitute their judgment for the necessarily discretionary judgment of a school

or university as to a student's educational performance. State ex rel. Mercurio v. Board of Regents 251
20. In a criminal prosecution any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony. State v. Miller 274
21. A hypothetical question is not improper simply because it includes only a part of the facts testified to. State v. Miller 274
22. A party who objects to testimony on a particular subject may not later claim that it was prejudiced because it had itself foreclosed inquiry into that subject matter. In re Application of ATS Mobile Telephone 403
23. To sustain a conviction for a crime, the corpus delicti must be proved beyond a reasonable doubt. State v. Workman 479
24. In order to establish the corpus delicti in an arson case, it is necessary that the evidence disclose the burning of the property as charged and that the burning was caused by the willful act of some person criminally responsible. State v. Workman 479
25. Uncontroverted testimony need not be accepted as absolute verity, especially when that testimony is opposed to common knowledge or human experience, or is inherently improbable, unreasonable, or unworthy of belief. In re Estate of McCartney 550
26. The trier of fact has a right to test the credibility of a witness by his self-interest and to weigh undisputed testimony against facts and circumstances in evidence from which a conclusion can be drawn that the testimony is not true. In re Estate of McCartney 550
27. Evidence offered by one defendant in a joint trial, if competent, is evidence against other persons charged in the same information. State v. Hilpert 564
28. Where the requisite elements of a crime are committed in different jurisdictions, if an essential element of the crime is committed in this state, jurisdiction to prosecute is present. State v. Hilpert 564
29. Where negotiations between the parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity. Silverman v. Arbor Street Partnership 628
30. In interpreting a written contract, the meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had

reason to know would be given to the words by the other party. Quinn v. Godfather's Investments 665
31. If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contracts or is necessary to carry their intention into effect, the law will imply the obligation and enforce it. Quinn v. Godfather's Investments 665
32. Generally, the rule of completeness is concerned with the danger of admitting a statement out of context. When this danger is not present it is not an abuse of discretion to fail to require the production of the remainder or, if it cannot be produced, to exclude all the evidence. State v. Manchester 670
33. The general rule is that the admissibility of physical evidence rests in the discretion of the trial court, and the determination of admissibility will not be overturned unless there is a clear abuse of discretion. State v. Manchester 670
34. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Bromwich 827
35. The admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant. State v. Bromwich 827

Expert Witnesses.

1. The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld in the absence of an abuse of discretion. State v. Jones 1
2. Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. Langfeld v. Department of Roads 15
3. The value of an opinion of an expert witness, or any witness, must be dependent upon and is no stronger than the facts upon which it is predicated, and it has no probative force unless the assumptions upon which it was based are shown to be true. Langfeld v. Department of Roads 15
4. An opinion of vehicular speed is proper, provided a sufficient foundation is laid to show the expertise of the

witness, as well as specific knowledge of the underlying facts to deal with the question in issue. State v. Miller 274

5. If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient. Morris v. Laaker 868

Fees.

1. A court has both inherent and statutory authority to appoint a guardian ad litem to protect the interests of a minor child engaged in, or affected by, litigation. Along with such authority goes the authority to award fees for such guardian's services. Nye v. Nye 364
2. The allowance of a guardian ad litem's fees and costs is discretionary and depends upon a consideration of all the facts and circumstances. Nye v. Nye 364

Foreclosure.

1. Sheriff's deeds are specially covered by Neb. Rev. Stat. §§ 77-1901 et seq. (Reissue 1981) and, unlike the provisions for tax certificates, there is no section establishing a presumption regarding service, as is true in the case of a treasurer's deed. Brown v. Glebe 318
2. A decree of foreclosure of a tax lien is of no effect as against the persons who were, at the time of the foreclosure, in actual possession and who were not made parties defendant in the action and had no notice or knowledge of the suit. Brown v. Glebe 318

Foreign Judgments.

Where the party against whom registration of a foreign judgment is sought appears in the proceeding, evidence has been taken, and there is no bill of exceptions, strict compliance with the statutory requirements relative to authentication as to subsequent entries affecting the judgment is not required. Snyder v. Nelson 605

Fraud.

1. The essential elements required to sustain an action for damages as the result of fraud are that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else was made recklessly; that the misrepresentation was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and that such party did, in fact, rely upon the misrepresentation and was induced thereby to act to his injury or damage. Flakus v. Schug 491

2. A disclaimer clause is relevant in determining whether a claimant relied on the false representation disclaimed in the clause; however, the disclaimer is ineffective to preclude the trier of fact from considering whether fraud induced formation of the bargain. Flakus v. Schug 491
3. As between a vendor and a purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud; however, where such facts are known to the vendor and he knows them to be not within the reach of the attention, observation, and judgment of a reasonably diligent purchaser, and they are such as would readily mislead the purchaser as to the true condition of the property, the vendor is bound to disclose such facts. Flakus v. Schug 491
4. One may make a misrepresentation by conduct as well as by spoken words. Flakus v. Schug 491
5. Generally, where there has been a misrepresentation in the sale of real estate, the measure of damages is the cost of placing the property conveyed in the condition represented, not exceeding the difference in value of the property conveyed and the value of the property if it had been as represented. Flakus v. Schug 491
6. Where one party to a transaction induces the other party to enter into it by willful misrepresentation, he cannot escape liability for his fraud by showing that such party could have investigated the representations made and would then have found that they were untrue. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873
7. Contributory negligence is generally not a defense to deliberate, active, or willful fraud. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873
8. A person is justified in relying upon a representation in all cases if it is a positive statement of fact and if an investigation would be required to discover the truth. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873
9. The fact that inquiries were made elsewhere which did not disclose the falsity of the representations is no defense. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873
10. An insurer may justifiably rely on the insured's representations unless to do so would be so utterly unreasonable, in the light of the information open to it and of its skill or experience, that its loss is its own responsi-

bility. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873

Guardians Ad Litem.

1. A court has both inherent and statutory authority to appoint a guardian ad litem to protect the interests of a minor child engaged in, or affected by, litigation. Along with such authority goes the authority to award fees for such guardian's services. Nye v. Nye 364
2. The allowance of a guardian ad litem's fees and costs is discretionary and depends upon a consideration of all the facts and circumstances. Nye v. Nye 364

Habeas Corpus.

1. Habeas corpus is not available to attack mere errors at trial from which a direct appeal could have been taken. Al-Hafeez v. Foster 483
2. Unless the granting of relief in a habeas corpus action will result in the immediate release from custody, the petition for such relief is premature. Al-Hafeez v. Foster 483

Highways.

As a general rule, under its police power, a state may, in the interest of safety and public welfare, restrict the weight of vehicles using its highways by reasonable and nondiscriminatory regulation. State v. Davison .. 173

Homicide.

1. In a homicide case, photographs of the victim, upon proper foundation, may be received for purposes of identification, to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice or intent. State v. Jones 1
   State v. Lamb 498
   State v. Sims 708
2. A photograph which illustrates or makes clear some controverted issue in a homicide case may be received even if it is gruesome, where a proper foundation has been laid. State v. Jones 1
   State v. Sims 708
3. In order to prove the requisite mental state for murder in the first degree, the State is required to show a condition of the mind which was manifested by intentionally doing a wrongful act without just cause or excuse and which is defined as any willful or corrupt intention of the mind. State v. Lamb 498
4. The effect of a sentence to life imprisonment for second

degree murder is an indeterminate sentence of 10 years to life. State v. Isherwood 592
5. Attempted murder requires proof of conduct amounting to a substantial step toward commission of the crime and which is strongly corroborative of the necessary criminal intent. State v. Manchester 670
6. Solicitation of an innocent agent to kill the victim may be proof of conduct amounting to a substantial step toward commission of attempted murder. State v. Manchester 670
7. Proof that the defendant made plans for the murder, solicited a killer, discussed the contract price and set the money aside in his billfold, arranged for a weapon, and showed the killer the victim, his residence, and his place of work is sufficient evidence of conduct amounting to a substantial step toward commission of attempted murder in the first degree, and will support a finding of guilty. State v. Manchester 670

Hypnosis.

1. Direct evidence obtained by reason of hypnosis is inadmissible per se. State v. Patterson 686
2. A witness will not be rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case; rather, the witness will be permitted to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, provided that there is sufficient evidence to satisfy the court that the evidence was known and related prior to hypnosis. State v. Patterson 686
State v. Levering 715

Immunity.

1. In order to be constitutionally adequate, the immunity granted by a state to a witness in a criminal case must afford protection to the witness extending to criminal proceedings by other states, or by the United States. State v. Jones 1
2. Constitutionally adequate statutory immunity must leave the witness and the federal government, or another state government, in substantially the same position as if the witness had claimed his constitutional privilege against self-incrimination, in the absence of a state grant of immunity. State v. Jones 1
3. The true test of the constitutionality of an immunity statute is whether the result under such a statute is the same as if the witness retained his fifth amendment right and did not testify. State v. Jones 1

4. Where the defendant has testified in a previous criminal case under a lawful grant of immunity, the sentencing court in a subsequent criminal case cannot consider such testimony or any information directly or indirectly derived from it in determining whether a death sentence should be imposed under the provisions of Neb. Rev. Stat. § 29-2523 (Reissue 1979) and related statutes. State v. Jones 1

Implied Consent Law.

1. Neb. Rev. Stat. § 39-669.09 (Reissue 1978) does not require the officer to inform the person to be tested of his privilege to request an independent test. State v. Miller 274
2. The use of an anticoagulant as a preservative for a blood sample is not a foundational requirement for the admission of evidence relating to test results, and the failure to use an anticoagulant goes only to the weight and credibility of the evidence. State v. Miller 274

Independent Contractor.

Generally, control, or the right of control, is the chief criterion in determining whether someone acts as an independent contractor. Maricle v. Spiegel 223

Indian Child Welfare Act.

Under the provisions of the Indian Child Welfare Act, 25 U.S.C.A. §§ 1901 et seq. (1983), "preadoptive placement" means the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement. In re Interest of Bird Head 741

Indictments and Informations.

An information charging an offense in substantially the words of the statute is generally sufficient. All defects that may be excepted to by a motion to quash are taken to be waived by a defendant pleading the general issue. State v. John 76

Injunction.

In a suit brought to enforce restrictive covenants, the plaintiff is entitled to an injunction without a showing of actual damages or that irreparable injury will result from a continued violation of the restrictive clause. Plumb v. Ruffin 335

Insanity.

1. Insanity as a defense must be shown to exist at the time of the offense. State v. Lamb 498
2. There is a rational basis for treating mentally ill dangerous persons who have been acquitted of a crime by reason of insanity differently than other mentally ill dangerous persons who have not. State v. Simants 638
3. Neb. Rev. Stat. §§ 29-3701 et seq. (Cum. Supp. 1982), insofar as they apply only to persons acquitted of crime by reason of insanity, are constitutional and do not violate the constitutional right of equal protection of the laws. State v. Simants 638

Installment Loans.

1. The exemptions specified in Neb. Rev. Stat. § 45-101.04(2), (3), and (4) (Reissue 1978) exempt the specified transactions from the installment loan act, Neb. Rev. Stat. §§ 8-435 et seq. (Reissue 1977), as well as from the interest rate limitations of § 45-101.03. McCaul v. American Savings Co. 841
2. Under the provisions of Neb. Rev. Stat. § 59-1617 (Reissue 1978) an installment loan by an industrial loan and investment company, regulated by the Nebraska Department of Banking and Finance, is exempt from the Consumer Protection Act, §§ 59-1601 et seq. McCaul v. American Savings Co. 841

Insurance.

1. An insurer is precluded from asserting a forfeiture where, after acquiring knowledge of the facts constituting a breach of condition, it has retained the unearned portion of the premium or has failed to return or tender it back with reasonable promptness, especially where the nature of the breach or ground for forfeiture is of such character as to render the policy void from its inception. Dairyland Ins. Co. v. Kammerer 108
2. Contracts of insurance, like other contracts, are to be construed according to the meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms will be taken and understood in plain, ordinary, and popular sense. Johnsen v. Harper 145
3. The term "private passenger automobile," as used in the "drive other vehicle" coverage section of an automobile liability insurance policy, is clear and unambiguous and does not include a pickup truck. Johnsen v. Harper 145
4. An insurer that gives one reason for its conduct and decision as to a matter involved in controversy cannot,

after litigation has begun, depend upon another and different ground. Mutual Benefit Life Ins. Co. v. Chisholm 301

5. The issuance of a life policy is dependent upon the health of the applicant, and a willful and intentional failure of an application to disclose, in response to direct and clear inquiry, that which the company had the right to know for the purpose of determining the true state of health of the applicant, and whether or not it would accept the risk, cannot be considered other than fraudulent. Mutual Benefit Life Ins. Co. v. Chisholm .. 301
6. The measure of damages for the loss caused by the negligence of the broker is the amount that would have been due under the policy if it had been obtained by the broker. Nebraska Truck Serv. v. U.S. Fire Ins. Co. ... 755
7. An insurer may justifiably rely on the insured's representations unless to do so would be so utterly unreasonable, in the light of the information open to it and of its skill or experience, that its loss is its own responsibility. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873

Intent.

1. In order to determine when a class should close under a testamentary disposition, it is necessary to try to ascertain the intent of the testator and, if legally possible, give effect to that intent, determined by a viewing of the entire will. In re Testamentary Trust of Criss 379
2. A patent ambiguity must be removed by interpretation according to legal principles, and the intention of the testator must be found in the will. In searching for this intention the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. In re Testamentary Trust of Criss 379
3. A clause or provision of a will must, if possible, be so construed as to give effect to the intention of the testator. If doubtful or ambiguous words, in their ordinary literal sense, appear to be inconsistent with plain and unambiguous language in the same clause or sentence, such words will be so construed, if reasonably possible, as to render the whole clause or sentence intelligible and consistent. In re Testamentary Trust of Criss 379

Intervention.

An intervenor may not change the issues but must accept the case as the intervenor finds it. Craig v. Kile 340

Joinder.

1. Evidence offered by one defendant in a joint trial, if competent, is evidence against other persons charged in the same information. State v. Hilpert 564
2. Where one of several defendants on trial together voluntarily becomes a witness, he is a witness for all purposes. If he knows facts injurious to a codefendant, they may be brought out either by his own counsel or by the State. State v. Hilpert 564

Judgments.

1. In reviewing criminal cases this court will not set aside the judgment of the trial court if there is sufficient evidence, taking the view most favorable to the State, to support the judgment. State v. Schmidt 126
   State v. Bromwich 827
2. The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. Lammers Land & Cattle Co. v. Hans 243
3. An action in the form of a creditor's bill or to set aside a conveyance in fraud of creditors cannot generally be founded upon a dormant judgment. Lammers Land & Cattle Co. v. Hans 243
4. A judgment which is not void is not subject to collateral attack, but a void judgment may be attacked at any time in any proceeding. Lammers Land & Cattle Co. v. Hans 243
5. A sale of real estate to satisfy a dormant judgment is, as to the judgment debtor, voidable only and cannot be attacked in collateral proceedings. Lammers Land & Cattle Co. v. Hans 243
6. When a judgment becomes dormant, the lien is lost as to the judgment debtor's grantee and is not revived by the new execution. Lammers Land & Cattle Co. v. Hans 243
7. A judgment of conviction which would have been invalid to support a sentence of imprisonment in the first instance is not valid to enhance the punishment in a subsequent case. State v. Smith 446
8. Where cases are interwoven and interdependent and the controversy involved has already been considered

and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action. Cedars Corp. v. Sun Valley Development Co. 622

Judicial Notice.

1. In an administrative hearing an agency may take notice of judicially cognizable facts and in addition take notice of general, technical, or scientific facts within its specialized knowledge. However, parties to such hearings will be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed so as to be afforded an opportunity to contest the facts so noticed. In re Application of ATS Mobile Telephone 403
2. An agency may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it during any hearing. In re Application of ATS Mobile Telephone 403
3. Even though the method by which an administrative agency takes notice of facts not presented at the hearing may not be technically correct, if the parties had full and fair opportunity to address that subject by cross-examination or otherwise, they may very well not have been prejudiced or unfairly surprised by the notice of facts taken by the agency. In re Application of ATS Mobile Telephone 403

Judicial Sales.

It is the general rule that confirmation of judicial sales rests largely within the discretion of the trial court, and will not be reviewed except for manifest abuse of such discretion. The discretion to be exercised is not arbitrary, however, but should be one which is sound and equitable in view of all the circumstances. The court must act in the interest of fairness and prudence, and with a regard to the rights of all concerned, and the stability of judicial sales. Nebraska State Bank & Trust Co. v. Wright 822

Juries.

1. The relative weight of conflicting evidence is necessarily determined by the credibility of the witnesses, which question is one solely for the jury which saw the witnesses and heard the testimony. State v. Brown ... 68
2. The jurors are the judges of the credibility of the witnesses and the weight to be given to the testimony, and

they have the right to credit or reject the whole or any part of the testimony in the exercise of their judgment. State v. Brown 68

3. In determining whether the evidence is sufficient to submit the issues of negligence or contributory negligence of an opposing party to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and to have the benefit of every reasonable inference that may be deduced from the evidence. If reasonable minds might draw different conclusions from the set of facts thus resolved, the issues of negligence or contributory negligence are for a jury. Parmenter v. Johnson 725

Jurisdiction.

1. Jurisdiction over a foreign corporation may be exercised by consent of such corporation. Mittelstadt v. Rouzer 178
2. By designating an agent upon whom process may be served within this state, a defendant has consented to the jurisdiction in personam by the proper court. Mittelstadt v. Rouzer 178
3. By appointing a resident agent for service as required by the Motor Carrier Act, 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. § 10330(b) (Supp. IV 1980)), a nonresident corporation has consented to jurisdiction within this state at least as to any cause of action arising out of its activities as a motor carrier in interstate commerce. Mittelstadt v. Rouzer 178
4. The District Court, sitting without a jury, has exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim defined in the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981). Catania v. University of Nebraska 418
5. Where the requisite elements of a crime are committed in different jurisdictions, if an essential element of the crime is committed in this state, jurisdiction to prosecute is present. State v. Hilpert 564
State v. Manchester 670

Jurors.

1. A party who fails to challenge the jurors for disqualification and passes the jurors for cause waives any objection to their selection. Schroll v. Fulton 310
2. A juror who has indicated an inability to fairly and impartially determine guilt may be excused for cause. State v. Lamb 498

Jury Instructions.

1. If an instruction is not sufficiently specific in some respect, it is the duty of counsel to offer requests to supply an omission. Langfeld v. Department of Roads ... 15
2. The giving of an incorrect instruction which may have affected the result unfavorably to the party complaining constitutes reversible error. In re Estate of Flider 153
3. Instructions should be considered together, and if, when considered as a whole, they correctly state the law, error cannot be predicated thereon. Holly v. Mitchell 203
4. It is the duty of the trial court to instruct the jury on the law of the case whether requested to do so or not. Failure to do so constitutes prejudicial error. State v. Lamb 498
   State v. Redding 887
5. Alleged errors in instructions which are not prejudicial to the complaining party are not grounds for reversal of a judgment otherwise correct. State v. Lamb 498
6. The repetition of an instruction is not reversible error unless its effect is to mislead the jury. State v. Andersen 695
7. It is uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to specific acts so alleged and supported. The failure to do so, even though not requested, is error. Enyeart v. Swartz 732
8. Ordinarily, a failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection thereafter. Enyeart v. Swartz 732
9. Noncompliance by counsel with the requirement that he object to a proposed jury instruction when it is submitted to him does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice. Enyeart v. Swartz 732
10. It is the duty of the trial court, whether requested to do so or not, to submit to and properly instruct the jury on all material issues presented by the pleadings and supported by the evidence. Enyeart v. Swartz 732
11. In instructing a jury, the trial court is not required to define language commonly used and generally understood. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873
12. The meaning of an instruction and not its phraseology is the important consideration. An inadvertent grammatical error in an instruction is harmless error if it is clear from the instruction itself and the other instruc-

tions given that the jury was not confused or misled by the error. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873
13. When the trial court does not give verbatim requested instructions but does adequately instruct regarding the issues upon which the requests are made, it is not error to refuse the proffered instructions. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873

Laches.

1. Where laches of the plaintiff and the staleness of his claim are apparent from the petition, objection thereto may be taken by demurrer. Roadrunner Development v. Sims 649
2. Laches does not grow out of the mere passage of time, but is founded upon the inequity of enforcing a claim where there has been a change in the condition of the property or in the relations of the parties. Roadrunner Development v. Sims 649
3. A plaintiff whose petition shows apparent laches on its face must generally plead and prove an excuse for the delay. Roadrunner Development v. Sims 649

Leases.

Bare lessees cannot be said to represent fee simple ownership, no matter how long the term of the lease. Easley v. City of Lincoln 450

Legislature.

The court, in considering the meaning of a statute, should, if possible, discover the legislative intent from the language of the act and give it effect. Mitchell v. County of Douglas 355

Licenses.

Under the provisions of Neb. Rev. Stat. § 29-2913 (Reissue 1979), an evaluating physician must be licensed to practice medicine in the State of Nebraska. State v. Sell .. 437

Liens.

A decree of foreclosure of a tax lien is of no effect as against the persons who were, at the time of the foreclosure, in actual possession and who were not made parties defendant in the action and had no notice or knowledge of the suit. Brown v. Glebe 318

Liquor Licenses.

1. The failure of a local governing body to approve an ap-

plication for a liquor license does not necessarily constitute a recommendation of denial and, standing alone, is insufficient evidence to support a denial of the application by the Nebraska Liquor Control Commission. Kerrey's, Inc. v. Neb. Liquor Control Comm. 442

2. At a hearing on an application for a liquor license, the burden is upon the applicant to prove its fitness and willingness to provide the service proposed, its ability to conform to the rules of the Nebraska Liquor Control Act, that its management and control exercised over the premises will insure compliance with such rules and regulations, and that the issuance of the license is or will be required by the present or future public convenience and necessity. Kerrey's, Inc. v. Neb. Liquor Control Comm. 442

3. Although the Liquor Control Commission may consider the recommendation of the local governing body in determining whether or not to issue such license, the burden is not on the applicant to provide evidence of such recommendation. Kerrey's, Inc. v. Neb. Liquor Control Comm. 442

Mandamus.

1. Before a writ of mandamus may issue, the relator must show clearly and conclusively that he is entitled to the particular relief requested; that the respondents are legally obligated to act; and the duty to act must be imposed by law and must be clear. State ex rel. Mercurio v. Board of Regents 251

2. A verification which is a part of an affidavit upon which a writ of mandamus is sought must be positively verified, and a verification based upon mere belief is inadequate. State ex rel. Van Cleave v. City of No. Platte .. 426

3. An action to procure the issuance of a writ of mandamus is not begun until a motion and affidavit, or a petition verified positively, is filed in the District Court. State ex rel. Van Cleave v. City of No. Platte 426

Marriage.

1. Marriage is a fact which may be proved by direct or circumstantial evidence, or by documentary or parol evidence. The weight and sufficiency of the evidence to prove marriage is governed by the general rules of evidence. In re Estate of McCartney 550

2. The general rule is that the burden of proof of marriage is upon the party who pleads it. In re Estate of McCartney 550

3. Where the issue is whether a marriage was ever con-

tracted, the burden of proof is on the party asserting its existence. In re Estate of McCartney 550
4. Common-law marriages are not recognized in Nebraska. Cohabitation without a ceremonial marriage is meretricious and is not evidence of marital status in this state. In re Estate of McCartney 550
5. In order to prove a marriage there must be proof that a ceremonial marriage took place. In re Estate of McCartney 550

Mental Competency.

1. In order to set aside an instrument or instruments for want of mental capacity on the part of the person executing such instruments, the burden of proof is upon the party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were executed that he could not understand and comprehend the purport and effect of what he was doing. Craig v. Kile 340
2. In order to prove the requisite mental state for murder in the first degree, the State is required to show a condition of the mind which was manifested by intentionally doing a wrongful act without just cause or excuse and which is defined as any willful or corrupt intention of the mind. State v. Lamb 498
3. The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. State v. Lamb 498
4. The fact that a defendant had some form of mental illness or defect does not by itself establish lack of responsibility. State v. Lamb 498

Mental Health.

1. Since 1976, only mentally ill dangerous persons are subject to involuntary commitment. Richards v. Douglas County 313
2. This court will not interfere on appeal with a final order made by the District Court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof. State v. Simants 638

Mentally Disordered Sex Offender.

This court will not disturb the District Court finding that an individual is a mentally disordered sex offender presently untreatable unless it can be said that there was no evidence upon which such conclusions could be

based and that such declaration was an abuse of discretion. State v. Sell 437

Miranda Rights.

1. "Custodial interrogation," within the meaning of the *Miranda* rule, means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. State v. Parsons 349
2. Police officers are not required to administer *Miranda* warnings to everyone whom they question, nor is the requirement of warnings to be imposed simply because questioning takes place in the station house or because the questioned person is one whom police suspect. State v. Parsons 349
3. *Miranda* warnings are required only when there has been such a restriction on a person's freedom as to render him in custody. State v. Parsons 349
4. Interrogation occurs when the subject is placed under a compulsion to speak. State v. Lamb 498
5. Generally, statements made in a conversation initiated by the accused are not the results of interrogation and are admissible. State v. Lamb 498
6. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. State v. Andersen 695
7. The admission of statements obtained in violation of *Miranda* may nevertheless be considered harmless error not requiring reversal of an otherwise valid conviction. For the error to be prejudicial and require reversal, the court must find that the jury would have found the State's case significantly less persuasive had the disputed testimony been excluded. State v. Andersen 695

Modification of Decree.

In actions for the modification of dissolution proceedings, it is the duty of this court to review de novo the determination of the District Court with regard to whether a change in circumstances has occurred which justified the modification of the original decree. Albers v. Albers 471

Mortgages.

1. A purchase-money mortgage generally takes precedence over all existing and subsequent claims and liens against the mortgagor as to the property sold. Commerce Savings Lincoln v. Robinson 596
2. A purchase-money mortgage is given for the unpaid purchase money on a sale of land as part of the same transaction as the deed, and its funds are actually used to buy the land. Commerce Savings Lincoln v. Robinson 596
3. A purchase-money mortgage given to secure a particular debt remains valid in equity for that purchase, whatever form the debt might assume, if it can be traced. The lien of a purchase-money mortgage having attached, it will not be displaced by a change in the form of the security. Commerce Savings Lincoln v. Robinson 596
4. An additional debt will discontinue the old mortgage only if the parties intended that it do so. Commerce Savings Lincoln v. Robinson 596
5. As a general rule, the cancellation of a mortgage on the record is not conclusive as to its discharge, or as to the payment of the indebtedness secured thereby. The parties' intention controls and can be shown by extrinsic evidence. Commerce Savings Lincoln v. Robinson 596

Motions for New Trial.

A motion for new trial on the ground of surprise is properly overruled where a request for a continuance for that reason was not made at the trial. Schroll v. Fulton 310

Motions to Strike.

It is not the function of a motion to strike to raise the merits of the cause or defense. However, a motion to strike which embodies the substance of an answer may, by waiver of the opposing party, be treated as an answer. Lammers Land & Cattle Co. v. Hans 243

Motions to Suppress.

Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong. State v. Lamb 498

Motor Carriers.

1. The burden is on the applicant to show that the proposed service is required by public convenience and

necessity. In determining that issue, the controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need: whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers, contrary to the public interest. In re Application of Crusader Coach Lines 53

2. As a general rule, under its police power, a state may, in the interest of safety and public welfare, restrict the weight of vehicles using its highways by reasonable and nondiscriminatory regulation. State v. Davison .. 173
3. Local regulation which may affect interstate commerce is constitutional only if the local interest is substantial and the police power is reasonably exercised, the burden on interstate commerce is slight, and the regulation does not discriminate against nonresidents or interstate commerce. State v. Davison 173

Motor Vehicles.

1. The admissibility of the speed of a vehicle shortly before a collision rests largely in the discretion of the trial court. Maricle v. Spiegel 223
2. An opinion of vehicular speed is proper, provided a sufficient foundation is laid to show the expertise of the witness, as well as specific knowledge of the underlying facts to deal with the question in issue. State v. Miller 274
3. The negligence of a family-purpose driver is not ordinarily imputed to the family-purpose owner in an action by the owner against a third party for the owner's own injuries or property damage. Paprocki v. Stopak 523
4. The owner of a family-purpose car may not recover from the driver of another car when the negligence of the family-purpose driver is the sole proximate cause of the collision. Paprocki v. Stopak 523
5. A driver approaching an intersection on the right of an oncoming vehicle may not proceed in disregard of the surrounding circumstances and, where necessary to avoid a collision, may be required to yield the right-of-way. Parmenter v. Johnson 725
6. A driver approaching an unprotected intersection where he knows or can observe that his view is obstructed must have his vehicle under such control as will give him a reasonable opportunity to react to a situation he does or could observe. Parmenter v. Johnson 725
7. The driver of a motor vehicle has the duty to keep a

proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way. He must keep a lookout in the direction from which others may be expected to approach. Parmenter v. Johnson 725

8. By the very nature of the passing maneuver it is necessary for the passing vehicle to be in such close proximity to the overtaken vehicle that if the latter suddenly and without warning swerves so as to block the way and slows down precipitously, there may be a collision. The operator of such passing vehicle need not anticipate that a motorist being overtaken will suddenly swerve so as to block the way, nor slow or stop so as to cause the passing vehicle to lose control, and the question of the negligence of either driver is generally a question of fact for the jury. Morris v. Laaker 868

Municipal Corporations.

1. A petition in error is designed to review the decision of the inferior tribunal. It is not to act as a super legislative or administrative agency to come to an independent conclusion. Andrews v. City of Fremont 148
2. Where a city by its charter is invested with certain powers, or the control and regulation of certain matters, and the charter fails to prescribe or direct the mode of exercise of the power so conferred, the council may act by resolution, and it will be as effectual as would an ordinance passed for the same purpose. Morrow v. City of Ogallala 414
3. Courts will not review or inquire into the legislative acts of municipal boards concerning matters within their power as to whether they acted expediently, wisely, or necessarily. Such are matters of pure legislative function, and not of judicial concern. Morrow v. City of Ogallala 414
4. An appeal from the disallowance of a claim against a city of the primary class is perfected by filing a notice of appeal and bond as provided in Neb. Rev. Stat. § 15-841 (Reissue 1977). Cole Investment Co. v. City of Lincoln 422

Municipal Ordinances.

1. Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will the Supreme Court. Andrews v. City of Fremont 148
2. The existence of a valid ordinance creating the offense

charged will be presumed where the ordinance is not properly set forth in the record. State v. Bruce 661

Negligence.

1. Where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff and the degree thereof when one is compared with the other, the issues must be submitted to the jury. Holly v. Mitchell 203
2. Even though a statute grants the right-of-way to a pedestrian crossing a street in the crosswalk, it does not excuse contributory negligence on his part. Holly v. Mitchell 203
3. The doctrine of last clear chance applies where there is negligence of the defendant subsequent to the negligence of the plaintiff, and the defendant's negligence is the proximate cause of the injury. Maricle v. Spiegel 223
4. Last clear chance is applicable only to excuse the contributory negligence of a plaintiff. Maricle v. Spiegel . 223
5. Recovery can not be had for acts of negligence not alleged in the petition. Maricle v. Spiegel 223
6. The negligence of a family-purpose driver is not ordinarily imputed to the family-purpose owner in an action by the owner against a third party for the owner's own injuries or property damage. Paprocki v. Stopak 523
7. The owner of a family-purpose car may not recover from the driver of another car when the negligence of the family-purpose driver is the sole proximate cause of the collision. Paprocki v. Stopak 523
8. In determining whether the evidence is sufficient to submit the issues of negligence or contributory negligence of an opposing party to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and to have the benefit of every reasonable inference that may be deduced from the evidence. If reasonable minds might draw different conclusions from the set of facts thus resolved, the issues of negligence or contributory negligence are for a jury. Parmenter v. Johnson 725
9. To the extent that *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), held that strict liability in tort may not be used to recover for physical harm to property only, it is disapproved. National Crane Corp. v. Ohio Steel Tube Co. 782
10. The purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or

strict liability in the absence of physical harm to persons or property caused by the defective product. National Crane Corp. v. Ohio Steel Tube Co. 782

11. By the very nature of the passing maneuver it is necessary for the passing vehicle to be in such close proximity to the overtaken vehicle that if the latter suddenly and without warning swerves so as to block the way and slows down precipitously, there may be a collision. The operator of such passing vehicle need not anticipate that a motorist being overtaken will suddenly swerve so as to block the way, nor slow or stop so as to cause the passing vehicle to lose control, and the question of the negligence of either driver is generally a question of fact for the jury. Morris v. Laaker 868

Notice.

1. Possession of land is notice to the world of the possessor's rights therein and of all interests which inquiry of the possessor would have revealed. Masid v. First State Bank 431
2. Where one is put on inquiry, he is charged with notice of all facts as he would have learned by a reasonable inquiry. Masid v. First State Bank 431
3. Due process requires at a minimum that deprivation of property by adjudication be preceded by notice and the opportunity to be heard as is appropriate to the nature of the case. Masid v. First State Bank 431
4. The whereabouts of a possessor of land are known and as such he is entitled to personal notice of any proceeding which may affect his interest in that land. Masid v. First State Bank 431
5. Where one appears before an administrative body and presents evidence or makes argument, the party so appearing cannot thereafter claim a denial of due process solely on the ground that proper notice of the hearing was not given. After appearing at the hearing the party is deemed to have waived any objection with regard to notice. Laubscher v. S.I.D. No. 20 834

Ordinances.

1. Ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established. State v. Davison 173
2. Local regulation which may affect interstate commerce is constitutional only if the local interest is substantial and the police power is reasonably exercised, the burden on interstate commerce is slight, and the

regulation does not discriminate against nonresidents or interstate commerce. State v. Davison 173
3. A comprehensive development plan is merely a policy statement that may be implemented by a zoning resolution. It is the zoning resolution which has the force of law. If there is a conflict between a comprehensive plan and a zoning ordinance, the zoning ordinance contains the controlling provisions when questions of a citizen's property rights are at issue. Omaha Fish & Wildlife v. Community Refuse 234
4. The operation of a commercial sanitary landfill is not a recognized incidental use to a farming operation so as to be considered an accessory use under zoning ordinances. Omaha Fish & Wildlife v. Community Refuse .. 234

Parental Rights.

An effective forfeiture of parental rights may be effected by the indifference of a parent for a child's welfare over a long period of time. Nye v. Nye 364

Parol Agreement.

A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration; and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof. Pearce v. ELIC Corp. 193

Parol Evidence.

1. The parol evidence rule relates only to agreements made prior to or contemporaneous with the written agreement and does not apply to parol agreements made after a written agreement. Pearce v. ELIC Corp. 193
2. Parol evidence is not admissible to add to, contradict, or vary the terms of a written contract. Silverman v. Arbor Street Partnership 628

Parties.

1. Where an administrative agency is charged with the responsibility of protecting the public interest as distinguished from determining the rights of two or more individuals in a dispute before such agency, it is a necessary party in any appellate proceeding. Leach v. Dept. of Motor Vehicles 103
2. Making an administrative agency a party defendant in an appeal under the provisions of Neb. Rev. Stat. § 60-420 (Reissue 1978) or § 84-917(2) (Reissue 1981) is

not an action against the State of Nebraska within the meaning of Neb. Rev. Stat. §§ 24-319 et seq. (Reissue 1979) so as to require service of summons upon the Governor and the Attorney General. Leach v. Dept. of Motor Vehicles 103
3. An appellee can not cross-appeal against another appellee. Maricle v. Spiegel 223
4. An intervenor may not change the issues but must accept the case as the intervenor finds it. Craig v. Kile . 340

Partnerships.

1. An action for the dissolution of a partnership and an accounting between partners is one in equity and is reviewed in this court de novo on the record. Bass v. Dalton 360
2. Imposed upon the Nebraska Supreme Court in such a case is the duty to reach an independent conclusion without reference to the findings of the District Court, bearing in mind and according respect and weight to the trial court's superior position as the original finder of fact. Bass v. Dalton 360

Pedestrians.

1. A pedestrian crossing at a regular crosswalk with the right-of-way has a right, until he has notice or knowledge to the contrary, to assume that others will respect his right-of-way. Holly v. Mitchell 203
2. Even though a statute grants the right-of-way to a pedestrian crossing a street in the crosswalk, it does not excuse contributory negligence on his part. Holly v. Mitchell 203

Pensions.

The meaning of the words "salary," as used in Neb. Rev. Stat. § 15-1007.01 (Cum. Supp. 1982), and "regular pay," as employed in § 15-1001 (Cum. Supp. 1982), are the same and include only basic pay without consideration of extra compensation for overtime, college credits, holiday service, etc. Hill v. City of Lincoln ... 517

Perjury.

Witnesses generally are immune from civil liability for damages resulting from testimonial statements, and no civil action lies to recover damages caused by perjury or for conspiracy to commit perjury unless the perjury is but a part of a larger plan or scheme. Stolte v. Blackstone 113

Photographs.

1. In a homicide case, photographs of the victim, upon proper foundation, may be received for purposes of identification, to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice or intent. State v. Jones 1
   State v. Lamb 498
   State v. Sims 708
2. A photograph which illustrates or makes clear some controverted issue in a homicide case may be received even if it is gruesome, where a proper foundation has been laid. State v. Jones 1
   State v. Sims 708
3. In cases where it is appropriate to admit some gruesome photographs into evidence, no more photographs than absolutely necessary should be used. State v. Jones 1
4. The admission into evidence of a gruesome photograph rests in the sound discretion of the trial court, which must determine its relevancy and weigh its probative value against its possible prejudicial effect. State v. Sims 708

Physicians and Surgeons.

Under the provisions of Neb. Rev. Stat. § 29-2913 (Reissue 1979), an evaluating physician must be licensed to practice medicine in the State of Nebraska. State v. Sell .. 437

Plea in Abatement.

1. Any error by the District Court in ruling on a plea in abatement is cured by a subsequent finding by the "trier of fact" of guilt beyond a reasonable doubt. State v. Schmidt 126
2. Generally, the pendency of a former action for the same cause between the same parties and in the same court constitutes a good plea in abatement. Miller v. Miller 219
3. The general rule that pendency of a prior action between the same parties for the same cause may be pled in abatement of a subsequent action will not be sustained where the prior action is pending in a court of a foreign or different jurisdiction. Miller v. Miller 219

Pleadings.

1. The refusal to permit an amendment which is proposed at an opportune time, and which should be made in the furtherance of justice, is an abuse of discretion on the part of the trial court. The law of amendments should

be liberally construed in order to prevent a failure of justice. Changes in judicial procedure have not altered the rule or indicated any reason for discontinuing its judicial application. Building Systems, Inc. v. Medical Center, Ltd. 49

2. The decision to allow or deny an amendment to the pleadings lies within the discretion of the trial court. Maricle v. Spiegel 223
3. Failure to plead mitigation of damages waives the defense. Maricle v. Spiegel 223
4. Recovery can not be had for acts of negligence not alleged in the petition. Maricle v. Spiegel 223
5. The pleadings frame the issues between the parties, and the evidence must be confined to those issues. Omaha Fish & Wildlife v. Community Refuse 234
6. Under Nebraska statutes, "The pleadings are the written statements by the parties of the facts constituting their respective claims and defenses." Neb. Rev. Stat. § 25-801 (Reissue 1979). "The rules of pleading formerly existing in civil actions are abolished and hereafter the forms of pleading in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this code." Neb. Rev. Stat. § 25-802 (Reissue 1979). "The only pleadings allowed are (1) the petition by the plaintiff; (2) the answer or demurrer by the defendant; (3) the demurrer or reply by the plaintiff; and (4) the demurrer to the reply by the defendant." Neb. Rev. Stat. § 25-803 (Reissue 1979). Lammers Land & Cattle Co. v. Hans 243
7. The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. Lammers Land & Cattle Co. v. Hans 243
8. The court must accept the facts as set forth in the petition and may not notice or consider extrinsic matters in determining whether a pleading states a cause of action. Heinzman v. County of Hall 268
9. A petition which contains no facts from which it can be concluded that it is impracticable to bring all of the parties before the court fails to state a necessary predicate for a class action. Roadrunner Development v. Sims 649
10. For purposes of determining the sufficiency of a petition to state a cause of action, we must accept as true all facts well pleaded, but we do not accept as true facts not well pleaded, nor do we accept as true conclu-

sions of law or of the pleader. Roadrunner Development v. Sims 649
11. The character of a pleading is determined by its content, not by its caption. Stigge v. Graves 847

Pleas.

1. A plea of nolo contendere must not only be intelligently and voluntarily made to be valid but the record must affirmatively disclose that the plea was entered understandingly and voluntarily. State v. Luther 476
2. A plea of guilty cannot be voluntary if the defendant is unaware of the penal consequences of such plea because of having been misinformed by the trial court, and such plea must be vacated and the defendant rearraigned. State v. McMahon 897

Police Officers and Sheriffs.

1. The office of sheriff and the office of jailer are separate and apart, although the sheriff may, if he elects, act as jailer. State ex rel. Landanger v. Madison County 33
2. If the sheriff performs the duties of jailer in addition to his duties as sheriff, he is entitled not to extra compensation for the performance of his duties as sheriff but to the compensation provided for the performance of the other duties as jailer. State ex rel. Landanger v. Madison County 33

Police Powers.

As a general rule, under its police power, a state may, in the interest of safety and public welfare, restrict the weight of vehicles using its highways by reasonable and nondiscriminatory regulation. State v. Davison .. 173

Political Subdivisions.

1. A distinction is recognized between taxation for general purposes and the levying of assessments on specific property for specific benefits conferred upon it by means of an improvement district created by an appropriate governing authority. Easley v. City of Lincoln 450
2. There is no constitutional prohibition against the assessment of a governmental subdivision for special benefits conferred upon its realty as the result of improvements created by an appropriate governing authority. Easley v. City of Lincoln 450

Political Subdivisions Tort Claims Act.

The findings of fact made by the District Court in an ac-

tion under the Political Subdivisions Tort Claims Act will not be disturbed on appeal unless clearly wrong. Richards v. Douglas County 313

Prejudgment Interest.

1. Generally, a party is not entitled to prejudgment interest where the amount due is not readily determinable by computation from data without reliance on opinion or discretion. Smith v. Fettin Roofing Co. 184
2. Prejudgment interest is allowable only where the amount of the claim is liquidated; conversely, where reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such a recovery, the claim is considered to be unliquidated and prejudgment interest is not allowed. Langel Chevrolet-Cadillac v. Midwest Bridge 283

Presumptions.

1. There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Once there is competent evidence on appeal to the contrary, the presumption disappears and the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence. Potts v. Board of Equalization 37
   Beynon v. Board of Equalization 488
2. Evidence of sale price alone may not be sufficient to overcome the presumption that the board of equalization has valued the property correctly. But where the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller who was not under compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration. Potts v. Board of Equalization 37
3. The presumption that a valuation made by a board of equalization is correct applies to the valuation of railroad property made by the state board. In re Assessment of OL&B Ry. Co. 71
4. Generally, there is a presumption that the acts of corporate officers pertaining to ordinary business transactions are authorized by the corporation. This presumption does not apply when an officer diverts or pledges corporate property as security for a personal debt. Val-U Constr. Co. v. Contractors, Inc. 291

5. When a corporate officer acts outside the scope of ordinary business, no presumption of authority arises and the other party to the transaction must make an inquiry into the officer's authority. Val-U Constr. Co. v. Contractors, Inc. 291
6. Sheriff's deeds are specially covered by Neb. Rev. Stat. §§ 77-1901 et seq. (Reissue 1981) and, unlike the provisions for tax certificates, there is no section establishing a presumption regarding service, as is true in the case of a treasurer's deed. Brown v. Glebe 318
7. Where a claimant has shown open, visible, continuous, and unmolested use for the prescriptive period, the use will be presumed to be under a claim of right. The burden then falls upon the owner of the servient estate to rebut that presumption by showing the use to be permissive. Masid v. First State Bank 431
8. The existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record. State v. Bruce 661
9. In the absence of other evidence, proof that the guidelines provided by the Tax Commissioner were applied raises a presumption that the assessment is legally proper. Where, however, evidence which establishes that following the guidelines will violate either the constitutional provisions requiring that property be taxed uniformly and proportionately or the statutory requirement that property be taxed at its actual value is introduced by either party, the guidelines must give way to the evidence. Farmers Co-op Assn. v. Boone County .. 763
Beynon Farm Products v. Bd. of Equalization 815

Prior Convictions.

1. In a proceeding to enhance the punishment because of prior convictions, the burden remains on the State to prove such convictions. State v. Smith 446
2. A judgment of conviction which would have been invalid to support a sentence of imprisonment in the first instance is not valid to enhance the punishment in a subsequent case. State v. Smith 446
3. That defendant's right to counsel was honored in a prior conviction may not be proved by a silent record. State v. Smith 446
4. At an enhancement proceeding, a defendant's objection to the reception in evidence of a transcript of a former conviction which fails to show on its face that counsel was afforded or the right waived does not constitute a collateral attack on such prior conviction. To the extent that *State v. Orosco*, 199 Neb. 532, 260 N.W.2d 303

(1977), and *State v. Voight*, 206 Neb. 829, 295 N.W.2d 112 (1980), conflict with this holding, they are overruled. State v. Smith 446

5. The record of a conviction used for enhancement purposes in a prosecution for third offense driving while intoxicated must show on its face a voluntary and intelligent waiver of the right to counsel or that the defendant was represented by counsel. State v. Vainiunas 800

Probable Cause.

The existence of probable cause must be determined by a practical and not by a technical standard. When objects which are indicative of a criminal offense are within the plain sight of an officer who has the right to be in the position to have such view, a seizure is justified and legal. State v. Jones 1

Proof.

1. The burden is on the applicant to show that the proposed service is required by public convenience and necessity. In determining that issue, the controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need; whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers, contrary to the public interest. In re Application of Crusader Coach Lines 53
2. A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive. Pearce v. ELIC Corp. 193
3. Under Neb. Rev. Stat. § 28-502 (Reissue 1979), arson in the first degree does not require proof that some part of the building was ignited. It is sufficient if the evidence shows there was some damage to the building. State v. Hohnstein 296
4. The fact that a building was constructed of nonflammable materials does not prevent proof of first degree arson under Neb. Rev. Stat. § 28-502 (Reissue 1979), since it is only necessary to show that some damage to the building resulted from the fire. State v. Hohnstein 296
5. Proof of the actual commission of an offense is sufficient to sustain a conviction for attempt. State v. Hohnstein 296

6. In order to set aside an instrument or instruments for want of mental capacity on the part of the person executing such instruments, the burden of proof is upon the party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were executed that he could not understand and comprehend the purport and effect of what he was doing. Craig v. Kile 340
7. The plaintiff bears the burden of establishing a causal relationship between the accident and any disability. Nordby v. Gould, Inc. 372
Caradori v. Frontier Airlines 513
8. Prescriptive rights are not looked upon with favor and, generally, must be proved by clear, convincing, and satisfactory evidence. Masid v. First State Bank 431
9. Abandonment must be pled and proved, the burden of proof being on the party alleging it. Masid v. First State Bank 431
10. In a proceeding to enhance the punishment because of prior convictions, the burden remains on the State to prove such convictions. State v. Smith 446
11. A judgment of conviction which would have been invalid to support a sentence of imprisonment in the first instance is not valid to enhance the punishment in a subsequent case. State v. Smith 446
12. That defendant's right to counsel was honored in a prior conviction may not be proved by a silent record. State v. Smith 446
13. To sustain a conviction for a crime, the corpus delicti must be proved beyond a reasonable doubt. State v. Workman 479
14. In order to establish the corpus delicti in an arson case, it is necessary that the evidence disclose the burning of the property as charged and that the burning was caused by the willful act of some person criminally responsible. State v. Workman 479
15. Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. Caradori v. Frontier Airlines 513
16. Marriage is a fact which may be proved by direct or

circumstantial evidence, or by documentary or parol evidence. The weight and sufficiency of the evidence to prove marriage is governed by the general rules of evidence. In re Estate of McCartney 550
17. The general rule is that the burden of proof of marriage is upon the party who pleads it. In re Estate of McCartney 550
18. Where the issue is whether a marriage was ever contracted, the burden of proof is on the party asserting its existence. In re Estate of McCartney 550
19. Common-law marriages are not recognized in Nebraska. Cohabitation without a ceremonial marriage is meretricious and is not evidence of marital status in this state. In re Estate of McCartney 550
20. In order to prove a marriage there must be proof that a ceremonial marriage took place. In re Estate of McCartney 550
21. The general rule is that payments are presumed to be voluntary, and the party seeking to recover a payment has the burden to prove that it was involuntary. Shanks v. City of South Sioux City 580
22. The party claiming a prescriptive right to an easement must prove that his use and enjoyment was adverse, under a claim of right, continuous and uninterrupted, open and notorious, and exclusive for the full prescriptive period. Biegert v. Dudgeon 617
23. A defendant challenging competency of counsel has the burden to establish it. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions. State v. Pope 645
24. A plaintiff whose petition shows apparent laches on its face must generally plead and prove an excuse for the delay. Roadrunner Development v. Sims 649
25. The measure of damages for the loss caused by the negligence of the broker is the amount that would have been due under the policy if it had been obtained by the broker. Nebraska Truck Serv. v. U.S. Fire Ins. Co. ... 755
26. Damages, like any other element of plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove plaintiff's alleged damages. Nebraska Truck Serv. v. U.S. Fire Ins. Co. 755
27. It is fundamental that the plaintiff's burden to prove the nature and amount of damages cannot be sustained by evidence which is speculative and conjectural. Nebraska Truck Serv. v. U.S. Fire Ins. Co. 755
28. Damages must be proved with all the certainty the

case permits and cannot be left to conjecture, guess, or speculation. Nebraska Truck Serv. v. U.S. Fire Ins. Co. 755

29. A property owner who attacks a special assessment as void has the burden of establishing its invalidity. Reiser v. Hartzler 802

Property.

One of the primary incidents of ownership of property in fee simple is the right to convey or encumber it. It is the general rule that a testator may not create a fee simple estate to vest at his death and at the same time restrict its alienation. However, this is not to say that such testator may not, in some situations, create economic incentives in his will encouraging the retention of property, without violating the rule condemning restrictions on alienation. In re Testamentary Trust of Criss 379

Property Division.

1. The rules for determining the division of property in an action for dissolution provide no mathematical formula by which such awards can be precisely determined. Such awards are determined by the facts in each case. Lord v. Lord 557
2. How property owned at marriage and acquired by gift or inheritance will be considered in determining division of property or award of alimony depends upon the facts of the particular case and the equities involved. Lord v. Lord 557

Prosecuting Attorneys.

1. Where requisite elements of the completed crime are committed in different jurisdictions, any state in which an essential part of the crime is committed has jurisdiction of the offense. State v. Manchester 670
2. Absent bad faith and prejudice to the defendant, the action of the trial court with regard to alleged misconduct of the prosecutor will not be deemed an abuse of discretion. State v. Manchester 670

Prosecutorial Discretion.

The general rule regarding prosecutorial discretion in law enforcement is that, unless there is proof that a particular prosecution was motivated by an unjustifiable standard based, for example, on race or religion, the use of such discretion does not violate constitutional protections. State v. Sprague 581

Public Officers and Employees.

1. Where the salary or compensation of a public officer is fixed by statute, no judicial action in that respect is required of the board of county commissioners and, in such a case, the provisions of Neb. Rev. Stat. § 23-135 (Reissue 1977) do not apply. Heinzman v. County of Hall 268
2. Under Nebraska law it is a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer. Heinzman v. County of Hall 268
3. Where a person is employed during the pleasure of two governmental agencies, either one may discharge unless otherwise specified in the contract of employment. Heinzman v. County of Hall 268

Public Property.

Ordinarily, public property is exempt from general purpose taxation. Easley v. City of Lincoln 450

Public Service Commission.

1. Upon an appeal from an order of the Public Service Commission, this court may decide only whether the commission acted within the scope of its authority and whether the order was based on evidence which shows that such order was not unreasonable or arbitrary. In re Application of Crusader Coach Lines 53
2. It is not the province of this court to weigh or resolve conflicts in the evidence or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission, but will sustain the action of the commission if there is evidence in the record to support it. In re Application of Crusader Coach Lines 53
   In re Application of ATS Mobile Telephone 403
3. The issue of public convenience and necessity is ordinarily one of fact, and where there is evidence in the record to sustain the Public Service Commission's order, this court cannot say that it is unreasonable and arbitrary. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Public Service Commission. In re Application of Crusader Coach Lines 53
4. The determination by the Public Service Commission as to whether the granting or rejecting of an application for service is within the public interest is a matter peculiarly within its expertise and involves a breadth of judgment and policy determination that will not be dis-

turbed by this court in the absence of a showing that the action of the commission was illegal or arbitrary, capricious, or unreasonable. In re Application of ATS Mobile Telephone 403

5. The striking of the balance between the competing interests of legitimate competition and the protection of the public interest as to the authorization of services regulated by the Public Service Commission are matters of legislative and administrative determination peculiarly resting in the judgment of the commission. The determination of the public interest is one that is peculiarly for the determination of the commission, and if there is evidence to sustain the finding this court cannot intervene. In re Application of ATS Mobile Telephone 403
6. If the record supports a decision by the Public Service Commission that an application for service should not be granted because the area proposed for the service is presently receiving or within a reasonable time will receive reasonably adequate service and that granting the application will create a duplication of facilities and is not in the interest of the public as provided by Neb. Rev. Stat. § 75-604 (Reissue 1981), the mere fact that the commission adds to its findings that to grant the particular application will unnecessarily extend the monopoly of the applicant to another area is not a necessary finding to justify the denial of such application; and although it may be an ill-advised statement, and as such objectionable, it does not constitute reversible error under the circumstances. In re Application of ATS Mobile Telephone 403

Railroads.

1. The review in this court of the assessment of railroad operating property made by the State Board of Equalization and Assessment is de novo on the record. In re Assessment of OL&B Ry. Co. 71
2. There are no infallible rules or criteria for the valuation of railroad property. Approximation is all that reasonably can be expected. In re Assessment of OL&B Ry. Co. 71
3. The presumption that a valuation made by a board of equalization is correct applies to the valuation of railroad property made by the state board. In re Assessment of OL&B Ry. Co. 71
4. The burden of showing the assessment was improper is on the complaining party. In re Assessment of OL&B Ry. Co. 71

5. Although the earnings of a railroad are evidence of importance in determining its value, the earning capacity of the railroad is of greater importance. In re Assessment of OL&B Ry. Co. 71

Real Estate.

A sale of real estate to satisfy a dormant judgment is, as to the judgment debtor, voidable only and cannot be attacked in collateral proceedings. Lammers Land & Cattle Co. v. Hans 243

Rebuttal Evidence.

The admission of rebuttal testimony is largely within the discretion of the trial court. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873

Records.

1. In the absence of a bill of exceptions it is presumed that the evidence sustained the findings of the trial court. The only issue that can be considered is whether the pleadings support the judgment. Caynor v. Caynor ... 143
Snyder v. Nelson 605
2. The failure of an administrative agency to prepare and transmit to the court a certified transcript of the proceedings had before it within 15 days after service of the petition, pursuant to Neb. Rev. Stat. § 84-917(4) (Reissue 1981), does not, in and of itself, entitle the party seeking review to have the agency's order set aside. Maurer v. Weaver 157
3. Where appeals are taken from an administrative agency to the District Court, pursuant to the provisions of Neb. Rev. Stat. § 84-917 (Reissue 1981), the certified transcript as prepared by the agency and transmitted to the court shall be considered to be before the court and shall, unless objected to by one of the parties, be considered without the need of either party formally offering the record into evidence. Maurer v. Weaver ... 157
4. Assignments of error requiring an examination of the evidence are not available on appeal in the absence of a bill of exceptions, the bill of exceptions being the only vehicle for bringing evidence to this court. This remains so even though certain evidence has been physically filed in the office of the clerk of the trial court. Snyder v. Nelson 605
State v. Manchester 670
5. Where there is no bill of exceptions, we are limited to an examination of the pleadings; if they are sufficient

to support the judgment, we will not reverse the trial court. Snyder v. Nelson 605
6. Opening and closing statements must appear in the bill of exceptions before alleged errors concerning them can be reviewed. State v. Manchester 670

Res Judicata.
1. The scope of the res judicata bar encompasses not only the issues actually litigated in the prior proceeding but also those issues which could have been raised; any right, fact, or matter in issue and directly adjudicated in a prior proceeding, or necessarily involved in the determination of such action before a competent court in which the judgment or decree was rendered upon the merits, is conclusively settled by such a judgment and may not again be litigated between the parties or their privies, whether the claim, demand, purpose, or subject matter of the two suits would or would not be the same. Pflasterer v. Koliopoulos 330
2. A former action bars all those issues which could have been raised upon the same facts sought to be presented in a subsequent action. Pflasterer v. Koliopoulos 330
3. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action. Cedars Corp. v. Sun Valley Development Co. 622

Restrictive Covenants.
1. Where powers are granted to a committee to approve or disapprove the erection of a fence based on a standard of whether it conforms to the harmony of external design and location in relation to surrounding structures, such a standard, per se, is not ambiguous and, in proper circumstances, it is enforceable, provided that the authority is exercised reasonably within the framework of the covenant purposes. Such rule is to be applied on a case-by-case basis. Normandy Square Assn. v. Ells 60
2. Property owners in a subdivision affected by restrictive covenants are not estopped from preventing a most flagrant violation of those restrictions simply because they had earlier failed to take steps to stop a slight deviation from the strict letter of such restrictions. Plumb v. Ruffin 335
3. In determining whether the character of a neighbor-

hood has so changed that the existing restrictive covenants can no longer be enforced, the test ordinarily is whether the original purpose and intention of the parties creating the restrictions are no longer of substantial benefit to the residents. The question is not whether suitable persons will in the future purchase property in the addition, but whether the restrictions still preserve to the addition its character of a residence district. Plumb v. Ruffin 335
Roadrunner Development v. Sims 649

4. An agreement restricting the use of land in a certain tract, imposed thereon by a common grantor under a general improvement plan, intended for the mutual benefit of all grantees therein, may be enforced in equity by any subsequent grantee in such tract, who purchased with reliance on the general plan, against any other subsequent grantee taking with notice of the restrictions. Plumb v. Ruffin 335
5. In a suit brought to enforce restrictive covenants, the plaintiff is entitled to an injunction without a showing of actual damages or that irreparable injury will result from a continued violation of the restrictive clause. Plumb v. Ruffin 335

Right to Counsel.

1. The right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel. State v. Jones 1
2. In the absence of a statute there is no authority requiring the appointment of counsel to represent an indigent prison inmate in a private civil matter. Caynor v. Caynor 143
3. That defendant's right to counsel was honored in a prior conviction may not be proved by a silent record. State v. Smith 446
4. Spontaneous statements made by the defendant, even after counsel has been requested, if not induced by the police or if made during conversations not initiated by the officers, are not "interrogation." The defendant must be subjected to "interrogation" in order for the right to counsel to come into play. State v. Lamb 498
5. The failure of the police to notify counsel, even if aware of such representation, does not violate the defendant's sixth amendment rights to the presence of counsel when the right has been waived voluntarily. State v. Lamb 498

Rules of Evidence.

1. A parent as an informed and concerned lay person is competent to testify as to his or her opinion on "best educative interest." The parents were not testifying as experts, and the evidence was clearly admissible under Neb. Rev. Stat. § 27-701 (Reissue 1979). In re Freeholder Petition 532
   In re Freeholder Petition 633
2. Neb. Rev. Stat. § 27-405 (Reissue 1979) permits evidence of specific instances of conduct where character is an essential element of a defense. State v. Sims 708
3. Neb. Rev. Stat. § 27-401 (Reissue 1979) defines relevance as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. State v. Bromwich 827
4. Generally, in the absence of an offer of proof no error may be predicated upon the court's ruling in excluding testimony. Morris v. Laaker 868

Rules of the Road.

1. A driver approaching an intersection on the right of an oncoming vehicle may not proceed in disregard of the surrounding circumstances and, where necessary to avoid a collision, may be required to yield the right-of-way. Parmenter v. Johnson 725
2. A driver approaching an unprotected intersection where he knows or can observe that his view is obstructed must have his vehicle under such control as will give him a reasonable opportunity to react to a situation he does or could observe. Parmenter v. Johnson 725
3. The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way. He must keep a lookout in the direction from which others may be expected to approach. Parmenter v. Johnson 725

Schools and School Districts.

1. The action of the board under Neb. Rev. Stat. § 79-403 (Reissue 1981) is an exercise of a quasi-judicial power, equitable in character, and upon appeal from the District Court to this court the cause is triable de novo as in any other equitable action. In re Freeholder Petition 532
2. A freeholder petition must be supported by an adequate

showing that the purposed transfer of land is justified in relation to the controlling educational factors regarding the convenience, necessity, or welfare of the pupil or pupils involved. Such a showing must include a demonstration of significant differences in the class, accreditation, leadership, management, curricula, and/or efficiency of the schools involved. In re Freeholder Petition 532

3. Best educative interest requires a showing that the convenience, necessity, or welfare of the student will be best served by the transfer, and may be demonstrated by proof of the accreditation of the respective schools, educational efficiency of the schools, and/or the leadership, management, and curricula of the schools involved. In re Freeholder Petition 633

Search and Seizure.

The existence of probable cause must be determined by a practical and not by a technical standard. When objects which are indicative of a criminal offense are within the plain sight of an officer who has the right to be in the position to have such view, a seizure is justified and legal. State v. Jones 1

Security Interests.

1. One without authority to encumber the property of another can not grant a valid security interest in such property. Val-U Constr. Co. v. Contractors, Inc. 291
2. When the collateral consists of goods purchased by the debtor, the sales article of the Uniform Commercial Code determines when the debtor has acquired rights in the collateral. First National Bank v. Rose 611
3. A land contract vendee has an equitable interest in the land. First National Bank v. Rose 611

Self-Incrimination.

The general rule is that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives. State v. Hilpert 564

Sentences.

1. Where the defendant has testified in a previous criminal case under a lawful grant of immunity, the sentencing court in a subsequent criminal case cannot consider such testimony or any information directly or in-

directly derived from it in determining whether a death sentence should be imposed under the provisions of Neb. Rev. Stat. § 29-2523 (Reissue 1979) and related statutes. State v. Jones 1

2. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Schmidt 126
State v. Komor 376
State v. Hilpert 564
State v. Isherwood 592
State v. Manchester 670
State v. Patterson 686
State v. Sims 708
State v. Christensen 820
State v. Bromwich 827
State v. Hellbusch 894
3. The Nebraska Supreme Court has authority to reduce a sentence when it is excessive and would result in a substantial miscarriage of justice. State v. Komor 376
4. Only a sentence which is clearly excessive is to be reduced by the Nebraska Supreme Court. State v. Komor 376
5. A prisoner serving an Iowa sentence who is transferred to Nebraska pursuant to the Interstate Corrections Compact remains subject to the jurisdiction of Iowa. Falkner v. Neb. Board of Parole 474
6. A Nebraska parole violator who is serving an Iowa sentence imposed for a subsequent offense does not recommence serving his Nebraska sentence until he has been released from custody by Iowa and arrested for the custody of the Nebraska Board of Parole. Falkner v. Neb. Board of Parole 474
7. The effect of a sentence to life imprisonment for second degree murder is an indeterminate sentence of 10 years to life. State v. Isherwood 592
8. Whenever a court considers a sentence for an offender convicted of a felony, the court may withhold a sentence of imprisonment unless, among other things, a lesser sentence will depreciate the seriousness of the crime or promote disrespect for the law. State v. Sims 708
9. When a court considers a sentence for a convicted offender, it shall, among other things, consider the offender's delinquency and criminal history. State v. Christensen 820

Service of Process.

1. Under the venue statutes, a nonresident defendant corporation "may be found" in any county within the state

in which proper service can be had upon its agent. Mittelstadt v. Rouzer 178
2. By designating an agent upon whom process may be served within this state, a defendant has consented to the jurisdiction in personam by the proper court. Mittelstadt v. Rouzer 178
3. The validity of service under the Motor Carrier Act, 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. § 10330(b) (Supp. IV 1980)), is not limited to causes of action arising out of commerce transacted by a foreign corporation within the state because the act deals with jurisdiction of the person. Mittelstadt v. Rouzer 178
4. By appointing a resident agent for service as required by the Motor Carrier Act, 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. § 10330(b) (Supp. IV 1980)), a nonresident corporation has consented to jurisdiction within this state at least as to any cause of action arising out of its activities as a motor carrier in interstate commerce. Mittelstadt v. Rouzer 178

Special Assessments.

1. A distinction is recognized between taxation for general purposes and the levying of assessments on specific property for specific benefits conferred upon it by means of an improvement district created by an appropriate governing authority. Easley v. City of Lincoln 450
2. There is no constitutional prohibition against the assessment of a governmental subdivision for special benefits conferred upon its realty as the result of improvements created by an appropriate governing authority. Easley v. City of Lincoln 450
3. The general rule is that payments are presumed to be voluntary, and the party seeking to recover a payment has the burden to prove that it was involuntary. Shanks v. City of South Sioux City 580
4. Where the physical facts are such that real property was not and could not be specially benefited by an improvement project, the assessment levied to pay for such improvement may be held to be arbitrary, constructively fraudulent, and therefore void and subject to collateral attack. Reiser v. Hartzler 802
5. However, to sustain a collateral attack on a special assessment, it is necessary that the evidence support a determination that in fact the property in question was not and could not be specially benefited by the particular improvement. Reiser v. Hartzler 802
6. Mere excessiveness of a special assessment may not be

corrected in a collateral attack upon the assessment. Reiser v. Hartzler 802
7. A property owner who attacks a special assessment as void has the burden of establishing its invalidity. Reiser v. Hartzler 802
8. The review of a collateral attack upon a special assessment is a proceeding in equity, which this court reviews de novo on the record. Reiser v. Hartzler 802

Specific Performance.

1. Where it appears that the vendor is unable to make a complete or perfect title, or that there is a deficiency in the quantity of land contracted to be sold, the general rule is that the vendee, if he so elects, is entitled to have the contract specifically performed to the extent of the vendor's ability to comply therewith and at the same time have a just abatement out of the purchase price for the deficiency of title, quantity, or quality of the estate to compensate for the vendor's failure to perform the contract in full. The measure of abatement should be such portion of the purchase price as the relative value of the land lost bears to the purchase price of the whole tract. Kuhlman v. Grimminger 64
2. A party seeking specific performance of an oral contract upon the basis of part performance must prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in part performance were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract, and further that nonperformance by the other party would amount to a fraud upon the party seeking specific performance. Yates v. Grosh 164

Speedy Trial.

A delay in sentencing of 90 days pending a court-imposed evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981) is not such a delay as to be violative of the sixth amendment right to a speedy trial. Kaba v. Fox 656

Statutes.

1. When a statute adopts the general law on a particular subject rather than a specific statute, it adopts not only the existing law but later legislation on the subject as well. Leach v. Dept. of Motor Vehicles 103
2. Ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established. State v. Davison 173

3. The court, in considering the meaning of a statute, should, if possible, discover the legislative intent from the language of the act and give it effect. Mitchell v. County of Douglas 355
4. In construing a statute, the court must look to the objects to be accomplished, the evils and mischiefs sought to be remedied, or the purpose to be served, and place on the statute a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. Mitchell v. County of Douglas 355
5. A statute proscribing otherwise free speech activity which "harasses" others, without setting forth standards comprising such harassment, is constitutionally infirm as vague because it impermissibly delegates to others, indiscriminately, the resolution, on an ad hoc and subjective basis, of the meaning of such term. Fowler v. Neb. Account. and Disclosure Comm. 462
6. The portion of Neb. Rev. Stat. § 46-613.01 (Reissue 1978), to wit, "if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska," may be severed from the rest of the statute because it did not constitute an inducement to the passage of § 46-613.01, does not make the act inoperative, and will not frustrate the intent of the Legislature. The remainder of § 46-613.01, after the unconstitutional portion is stricken, remains a viable statute. State ex rel. Douglas v. Sporhase 484
7. Legislative definitions of terms used to adequately express the purpose of a particular legislative act do not change the common meaning of words used in matters disconnected therewith, unless the same are adopted by reference. Hill v. City of Lincoln 517
8. Where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning, and in the absence of anything to indicate the contrary, words will be given their ordinary meaning. Hill v. City of Lincoln 517
9. A sensible construction will be placed upon a statute to effectuate the object of legislation, rather than a literal meaning that would have the effect of defeating the legislative intent. Hill v. City of Lincoln 517
State v. Coffman 560
10. Whether words are ambiguous is a question of law for the court. Hill v. City of Lincoln 517
11. The constitutional requirement that statutory language must be reasonably certain or be held void for vagueness is satisfied by the use of ordinary terms which find

adequate interpretation in common usage and understanding. Roth v. School Dist. of Scottsbluff 545
State v. Sprague 581
12. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. State v. Sprague 581
13. A person to whom a statute may be constitutionally applied will not be heard to challenge the statute on the ground that it might conceivably be applied unconstitutionally to others in situations not before the court. State v. Sprague 581
14. The test for determining whether a statute is vague is whether it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. State v. Sprague 581
15. In determining whether a statute is vague and therefore does not give a defendant adequate notice that his conduct is proscribed, the statute must be examined in light of the conduct with which the defendant is charged. State v. Sprague 581
16. The Legislature may authorize an agency to make rules and regulations for the operation and enforcement of a law, such to be limited to rules within the express legislative purpose of the act and to be administered in accordance with standards expressed in the act. State v. Sprague 581
17. No unconstitutional delegation of authority occurs when the Legislature defines a crime and sets a penalty therefor, but delegates the implementation of details to an administrative agency. State v. Sprague 581
18. The manner and method of enforcing a law may be delegated, since of necessity this must be left to the reasonable discretion of administrative officers. State v. Sprague 581
19. That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. State v. Sprague 581
20. It has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the equal protection clause of the fourteenth amendment if any state of facts reasonably can be conceived that would sustain it. State v. Sprague 581
21. A penal statute is one by which a forfeiture is imposed for transgressing the provisions of the act and where the extent of liability imposed is not measured or lim-

ited by the damage caused by the act or omission. Hancock v. State ex rel. Real Estate Comm. 807

22. A penal statute is strictly construed, and its import may not be extended by construction to situations not clearly within its provisions. Nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute. Hancock v. State ex rel. Real Estate Comm. 807

23. The meaning of the word "know," when used in a penal statute, varies with the context in which it is used. Hancock v. State ex rel. Real Estate Comm. 807

Stock.

Generally, "book value" of the stock in a corporation means the figure obtained by dividing the difference between assets and liabilities by the number of outstanding shares of stock. Smith v. Fettin Roofing Co. . 184

Strict Liability.

1. The doctrine of strict liability in tort may be used to recover damages to the defective product itself where the damage occurred as a result of a sudden, violent event and not as a result of an inherent defect that reduced the property's value without inflicting physical harm to the product. National Crane Corp. v. Ohio Steel Tube Co. 782

2. To the extent that *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), held that strict liability in tort may not be used to recover for physical harm to property only, it is disapproved. National Crane Corp. v. Ohio Steel Tube Co. 782

3. The purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product. National Crane Corp. v. Ohio Steel Tube Co. 782

Subrogation.

The doctrine of subrogation includes every instance in which one person pays a debt for which another is primarily liable and which in equity and good conscience should have been discharged by the latter, so long as the payment was made under compulsion or for the protection of some interest of the one making the payment and in discharge of an existing liability. Scott v. Langvardt 854

Summary Judgment.

1. The absence of a genuine issue as to any material fact and entitlement to judgment as a matter of law are prerequisites to a summary judgment. Stolte v. Blackstone 113
2. The purpose of a motion for summary judgment is to pierce the allegations of the pleadings and to show conclusively that the controlling facts are otherwise than as alleged. Stolte v. Blackstone 113
3. Summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear. Stolte v. Blackstone 113
4. Under Nebraska law the primary purpose of the summary judgment statute, Neb. Rev. Stat. § 25-1332 (Reissue 1979), is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense. Mutual Benefit Life Ins. Co. v. Chisholm 301
   Galyen Petroleum Co. v. Hixson 683
5. Summary judgment should be rendered forthwith if the pleadings, depositions, and admissions are on file, together with the affidavit, if any, showing that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Mutual Benefit Life Ins. Co. v. Chisholm 301
6. Summary judgment may be properly granted where there exists no genuine issue as to any material fact in the case, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law. Snyder v. Nelson 605
   First National Bank v. Rose 611

Supersedeas Bonds.

As a rule, a supersedeas or stay does not reverse, annul, or undo what has already been done, or impair the force or pass on the merits of the judgment, order, or decision of the trial court; and the judgment, order, or decree is not vacated or annulled, nor is its validity or effect impaired thereby. Kleeb v. Kleeb 537

Taxation.

1. All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable value on which the levy shall be made. Neb. Rev.

Stat. § 77-201 (Reissue 1981). Potts v. Board of Equalization 37
Beynon Farm Products v. Bd. of Equalization 815
2. Under the provisions of Neb. Rev. Stat. §§ 77-202.01 and 77-202.02 (Reissue 1981) any person seeking tax exempt status for any real property shall apply for exemption to the county assessor by January 1 of the year following adoption of §§ 77-202.01 to 77-202.07, on forms prescribed by the Tax Commissioner, and a hearing shall be held by the county board of equalization to consider the matter. Potts v. Board of Equalization 37
3. There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Once there is competent evidence on appeal to the contrary, the presumption disappears and the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence. Potts v. Board of Equalization 37
Beynon v. Board of Equalization 488
4. Evidence of sale price alone may not be sufficient to overcome the presumption that the board of equalization has valued the property correctly. But where the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller who was not under compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration. Potts v. Board of Equalization 37
5. The trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding. Potts v. Board of Equalization . 37
Beynon Farm Products v. Bd. of Equalization 815
6. Ordinarily, public property is exempt from general purpose taxation. Easley v. City of Lincoln 450
7. A distinction is recognized between taxation for general purposes and the levying of assessments on specific property for specific benefits conferred upon it by means of an improvement district created by an appropriate governing authority. Easley v. City of Lincoln 450
8. In an appeal from property tax valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, or that its

value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Beynon v. Board of Equalization 488

9. Under the provisions of Neb. Rev. Stat. § 77-1502 (Reissue 1981) the county board of equalization may meet at any time for the purpose of equalizing assessments of any omitted or undervalued property and is not limited in its actions to property which the assessor has adjusted prior to April 1 of the year in question. Farmers Co-op Assn. v. Boone County 763

10. An owner is not deprived of his property without due process of law by means of taxation, if he has an opportunity to question its validity or the amount of such tax or assessment at some stage of the proceedings, either before that amount is finally determined or in subsequent proceedings for its collection. Farmers Co-op Assn. v. Boone County 763

11. In the absence of other evidence, proof that the guidelines provided by the Tax Commissioner were applied raises a presumption that the assessment is legally proper. Where, however, evidence which establishes that following the guidelines will violate either the constitutional provisions requiring that property be taxed uniformly and proportionately or the statutory requirement that property be taxed at its actual value is introduced by either party, the guidelines must give way to the evidence. Farmers Co-op Assn. v. Boone County .. 763
Beynon Farm Products v. Bd. of Equalization 815

12. Authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value, and the ultimate question is whether the method used ultimately attains a reasonable degree of uniformity in value. Approximation of value and uniformity of taxation is all that can be accomplished, and substantial compliance with the requirement of equalization and uniformity of taxation laid down by the Constitution is all that is required. Farmers Co-op Assn. v. Boone County 763
Beynon Farm Products v. Bd. of Equalization 815

13. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the

result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. Farmers Co-op Assn. v. Boone County 763
14. A landowner is entitled to have his property assessed uniformly and proportionately with other property even though the result may be that it is assessed at less than actual value. Beynon Farm Products v. Bd. of Equalization 815
15. Misclassifying property may result in a lack of uniformity and proportionality; in such an event the taxpayer is entitled to relief. Beynon Farm Products v. Bd. of Equalization 815

Teacher Contracts.

1. A probationary teacher is entitled to none of the termination or rehiring benefits allowed under Neb. Rev. Stat. §§ 79-1254 et seq. (Reissue 1981), including the preferred rights to reemployment under § 79-1254.07. Roth v. School Dist. of Scottsbluff 545
2. "Reduction in force," within the meaning of Neb. Rev. Stat. § 79-1254.07 (Reissue 1981), has a clear meaning in common usage and means terminating a teacher "due to a surplus of staff." Roth v. School Dist. of Scottsbluff 545
3. The question of whether a person has waived a right to recall under Neb. Rev. Stat. § 79-1254.07 (Reissue 1981) is one of fact. Roth v. School Dist. of Scottsbluff 545
4. The computing of damages and the finding that a teacher has properly mitigated damages under Neb. Rev. Stat. § 79-1254.07 (Reissue 1981) are factual issues, and the findings of the trial court in this regard will not be set aside unless clearly wrong. Roth v. School Dist. of Scottsbluff 545

Termination of Employment.

1. Under the U. S. Constitution, one must first establish a property interest in a position in order to establish procedural due process rights in a dismissal from employment. Heinzman v. County of Hall 268
2. The establishment of a property interest in employment requires a legitimate claim of entitlement to it that stems from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Heinzman v. County of Hall 268
3. Under Nebraska law it is a settled principle that government employment, in the absence of legislation, can

be revoked at the will of the appointing officer. Heinzman v. County of Hall 268
4. Where a person is employed during the pleasure of two governmental agencies, either one may discharge unless otherwise specified in the contract of employment. Heinzman v. County of Hall 268

Theft.

1. The value of goods stolen under Neb. Rev. Stat. §§ 28-510 et seq. (Reissue 1979) is a material or essential element of the crime of attempted theft in order to establish the gradation of the offense, and it must be proven beyond a reasonable doubt. State v. Redding .. 887
2. If the uncontroverted evidence supports a finding beyond a reasonable doubt of the attempted theft of but one item of property consisting of cash of a stated amount, the fact that a jury returns a verdict of guilty based upon instructions which failed to include specific value as a material element of the crime is harmless error. State v. Redding 887

Tort Claims Act.

1. The District Court, sitting without a jury, has exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim defined in the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981). Catania v. University of Nebraska 418
2. The findings of the District Court under the State Tort Claims Act will not be disturbed on appeal unless clearly wrong. Catania v. University of Nebraska 418
3. Where there is a conflict in the evidence, but there is believable evidence to support the findings of the District Court in a claim of this nature, those findings will be affirmed. Catania v. University of Nebraska 418

Torts.

1. The doctrine of strict liability in tort may be used to recover damages to the defective product itself where the damage occurred as a result of a sudden, violent event and not as a result of an inherent defect that reduced the property's value without inflicting physical harm to the product. National Crane Corp. v. Ohio Steel Tube Co. 782
2. To the extent that *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), held that strict liability in tort may not be used to recover for physical harm to property only, it is disapproved. National Crane Corp. v. Ohio Steel Tube Co. 782

3. The purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product. National Crane Corp. v. Ohio Steel Tube Co. 782

Trial.

1. A prison inmate has no absolute constitutional right to be released from prison so that he can be present at a hearing in a civil action. Caynor v. Caynor 143
2. Generally, a proper objection to the receipt of evidence is required to preserve for review any error in the overruling of a motion in limine. Maricle v. Spiegel 223
3. A defendant can not predicate error on the denial of a motion in limine when his objection to the evidence was sustained. Maricle v. Spiegel 223
4. When, upon a jury trial, a defendant at the conclusion of all the evidence moves for a directed verdict in his favor or for dismissal, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to plaintiffs, and plaintiffs are entitled to the benefit of all proper inferences which can reasonably be deduced therefrom. Flakus v. Schug 491
5. Generally, the rule of completeness is concerned with the danger of admitting a statement out of context. When this danger is not present it is not an abuse of discretion to fail to require the production of the remainder or, if it cannot be produced, to exclude all the evidence. State v. Manchester 670

Trusts.

An action to construe a trust indenture will be reviewed in this court de novo on the record. In re Testamentary Trust of Criss 379

Undue Influence.

1. The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are: (1) That the person who executed the instrument was subject to undue influence; (2) That there was opportunity to exercise undue influence; (3) That there was a disposition to exercise undue influence for an improper purpose; and (4) That the result was clearly the effect of such undue influence. Craig v. Kile 340
2. It is not mere influence that makes a conveyance un-

lawful but *undue* influence as established in the law. Craig v. Kile 340

3. The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance. Craig v. Kile 340

Uniform Commercial Code.

1. One without authority to encumber the property of another can not grant a valid security interest in such property. Val-U Constr. Co. v. Contractors, Inc. 291
2. When the collateral consists of goods purchased by the debtor, the sales article of the Uniform Commercial Code determines when the debtor has acquired rights in the collateral. First National Bank v. Rose 611
3. A land contract vendee has an equitable interest in the land. First National Bank v. Rose 611

Valuation.

1. All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable value on which the levy shall be made. Neb. Rev. Stat. § 77-201 (Reissue 1981). Potts v. Board of Equalization 37
2. Under the provisions of Neb. Rev. Stat. §§ 77-202.01 and 77-202.02 (Reissue 1981) any person seeking tax exempt status for any real property shall apply for exemption to the county assessor by January 1 of the year following adoption of §§ 77-202.01 to 77-202.07, on forms prescribed by the Tax Commissioner, and a hearing shall be held by the county board of equalization to consider the matter. Potts v. Board of Equalization 37
3. There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Once there is competent evidence on appeal to the contrary, the presumption disappears and the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence. Potts v. Board of Equalization 37
Beynon v. Board of Equalization 488

4. Evidence of sale price alone may not be sufficient to overcome the presumption that the board of equalization has valued the property correctly. But where the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller who was not under compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration. Potts v. Board of Equalization 37
5. The trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding. Potts v. Board of Equalization . 37
6. There are no infallible rules or criteria for the valuation of railroad property. Approximation is all that reasonably can be expected. In re Assessment of OL&B Ry. Co. 71
7. The presumption that a valuation made by a board of equalization is correct applies to the valuation of railroad property made by the state board. In re Assessment of OL&B Ry. Co. 71
8. The burden of showing the assessment was improper is on the complaining party. In re Assessment of OL&B Ry. Co. 71
9. Although the earnings of a railroad are evidence of importance in determining its value, the earning capacity of the railroad is of greater importance. In re Assessment of OL&B Ry. Co. 71
10. In an appeal from property tax valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Beynon v. Board of Equalization 488
11. Authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value, and the ultimate question is whether the method used ultimately attains a reasonable degree of uniformity in value. Approximation of value and uniformity of taxation is all that can be accomplished, and substantial compliance with the requirement of equalization and uniformity of taxation laid down by the Constitution is all that is required. Farmers Co-op Assn. v. Boone County 763
Beynon Farm Products v. Bd. of Equalization 815

12. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will of failure of plain duty, and not mere errors of judgment. Farmers Co-op Assn. v. Boone County 763
13. A landowner is entitled to have his property assessed uniformly and proportionately with other property even though the result may be that it is assessed at less than actual value. Beynon Farm Products v. Bd. of Equalization 815
14. Misclassifying property may result in a lack of uniformity and proportionality; in such an event the taxpayer is entitled to relief. Beynon Farm Products v. Bd. of Equalization 815

Value of Goods.

1. The value of goods stolen under Neb. Rev. Stat. §§ 28-510 et seq. (Reissue 1979) is a material or essential element of the crime of attempted theft in order to establish the gradation of the offense, and it must be proven beyond a reasonable doubt. State v. Redding .. 887
2. If the uncontroverted evidence supports a finding beyond a reasonable doubt of the attempted theft of but one item of property consisting of cash of a stated amount, the fact that a jury returns a verdict of guilty based upon instructions which failed to include specific value as a material element of the crime is harmless error. State v. Redding 887
3. In the absence of evidence to the contrary, cash in the amount of $12,000 must have a value of "over one thousand dollars." State v. Redding 887

Vendor and Vendee.

As between a vendor and a purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud; however, where such facts are known to the vendor and he knows them to be not within the reach of the attention, observation, and judgment of a reasonably diligent purchaser, and they are such as would

readily mislead the purchaser as to the true condition of the property, the vendor is bound to disclose such facts. Flakus v. Schug 491

Venue.

Under the venue statutes, a nonresident defendant corporation "may be found" in any county within the state in which proper service can be had upon its agent. Mittelstadt v. Rouzer 178

Verdicts.

1. This court will not interfere with a jury verdict of guilty based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Brown 68
   State v. Holland 170
   Maricle v. Spiegel 223
   Schroll v. Fulton 310
   State v. Hilpert 564
2. It is presumed in a jury trial that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong. Holly v. Mitchell 203
   Flakus v. Schug 491
3. A verdict will not be set aside unless it is against the weight of the evidence, or appears to have been the result of passion, prejudice, mistake, or disregard of the rules of evidence or the law. Maricle v. Spiegel 223
4. When a party has sustained the burden and expense of trial and has succeeded in securing the decision of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Flakus v. Schug 491

Visitation.

The best interests of the children are the primary concern in the determination of custody and visitation matters. Caynor v. Caynor 143

Waiver.

1. An information charging an offense in substantially the words of the statute is generally sufficient. All defects that may be excepted to by a motion to quash are taken to be waived by a defendant pleading the general issue. State v. John 76

2. An insurer is precluded from asserting a forfeiture where, after acquiring knowledge of the facts constituting a breach of condition, it has retained the unearned portion of the premium or has failed to return or tender it back with reasonable promptness, especially where the nature of the breach or ground for forfeiture is of such character as to render the policy void from its inception. Dairyland Ins. Co. v. Kammerer 108
3. A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive. Pearce v. ELIC Corp. 193
4. Conditions precedent in a contract may be waived. Pearce v. ELIC Corp. 193
5. A provision in a written contract that a waiver of the conditions and terms of the agreement must be in writing may be waived by acts or conduct. Pearce v. ELIC Corp. 193
6. The general rule is that the assertion of the invalidity of a contract is nullified by the subsequent acceptance of benefits growing out of the contract claimed to have been breached. Pearce v. ELIC Corp. 193
7. Where a contracting party, with knowledge of a breach by the other party, receives money in the performance of the contract, he will be held to have waived the breach. Pearce v. ELIC Corp. 193
8. Failure to plead mitigation of damages waives the defense. Maricle v. Spiegel 223
9. The failure of the police to notify counsel, even if aware of such representation, does not violate the defendant's sixth amendment rights to the presence of counsel when the right has been waived voluntarily. State v. Lamb 498
10. The question of whether a person has waived a right to recall under Neb. Rev. Stat. § 79-1254.07 (Reissue 1981) is one of fact. Roth v. School Dist. of Scottsbluff 545
11. Following a motion for a directed verdict at the close of the evidence of the State, the introduction of evidence thereafter by the defendant waives any error in the ruling or failure of ruling on the motion, although the defendant is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction. State v. Hilpert 564
State v. Hellbusch 894
12. The general rule is that a defendant's testimony at a former trial is admissible in evidence against him in

later proceedings. A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives. State v. Hilpert 564

13. The accused may waive his right of confrontation, and the waiver of this right may be accomplished by the accused's counsel as a matter of trial tactics or strategy. State v. Bromwich 827
14. Counsel in a criminal case may waive his client's fourteenth amendment right of the U.S. Constitution of confrontation by stipulating to the admission of evidence as a legitimate trial tactic. State v. Bromwich 827
15. Where one appears before an administrative body and presents evidence or makes argument, the party so appearing cannot thereafter claim a denial of due process solely on the ground that proper notice of the hearing was not given. After appearing at the hearing the party is deemed to have waived any objection with regard to notice. Laubscher v. S.I.D. No. 20 834

Waters.

The portion of Neb. Rev. Stat. § 46-613.01 (Reissue 1978), to wit, "if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska," may be severed from the rest of the statute because it did not constitute an inducement to the passage of § 46-613.01, does not make the act inoperative, and will not frustrate the intent of the Legislature. The remainder of § 46-613.01, after the unconstitutional portion is stricken, remains a viable statute. State ex rel. Douglas v. Sporhase 484

Wills.

1. A challenge to a spouse's statutory election to take against a will is tried in this court de novo on the record. In re Estate of Carman 98
2. If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed, subject to rebuttal. Neb. Rev. Stat. § 30-2430(b) (Reissue 1979). In re Estate of Flider 153
3. The presumption of due execution arising from the acknowledgment of a self-proved will may be attacked by proof of fraud or forgery affecting the acknowledgment or affidavit. Neb. Rev. Stat. § 30-2430(b) (Reissue 1979). In re Estate of Flider 153
4. In the absence of proof that the formalities required by

the statute were not complied with, the presumption of due execution raised by the acknowledgment is conclusive. In re Estate of Flider 153
5. Due execution means the signing of the will by the testator, and the attestation. Testamentary capacity is not a component of due execution under the statute. In re Estate of Flider 153
6. A prior will, executed when the testator's testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to the results produced to the instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capacity by showing that the testator had a constant and abiding scheme for the distribution of his property. In re Estate of Flider 153
7. A devise to "issue" or "issue of the body" will be construed as meaning lineal descendants, rather than children, in the absence of qualifying words showing a contrary intent. In re Testamentary Trust of Criss 379
8. In order to determine when a class should close under a testamentary disposition, it is necessary to try to ascertain the intent of the testator and, if legally possible, give effect to that intent, determined by a viewing of the entire will. In re Testamentary Trust of Criss 379
9. Generally speaking, a will speaks as of the date of death of the testator, and in the absence of anything in the will showing a contrary intention, the number of the class will be determined upon the death of the testator. In re Testamentary Trust of Criss 379
10. Whenever the increase in the period of postponement of the closing of a class would render invalid, under the applicable rule against perpetuities, either the disposition of income to the class or part or all of the ultimate disposition of the corpus, then such invalidity is sufficient to prevent the lengthening of the period during which the class can increase in membership. In re Testamentary Trust of Criss 379
11. It is the general rule that in the absence of a controlling equity, or of an express or implied provision in the will to the contrary, where an estate is given to a person for life with a vested remainder in another, the remainder takes effect in possession whenever the prior gift ceases or fails in whatever manner. In re Testamentary Trust of Criss 379
12. A patent ambiguity must be removed by interpretation according to legal principles, and the intention of the

testator must be found in the will. In searching for this intention the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. In re Testamentary Trust of Criss 379

13. A clause or provision of a will must, if possible, be so construed as to give effect to the intention of the testator. If doubtful or ambiguous words, in their ordinary literal sense, appear to be inconsistent with plain and unambiguous language in the same clause or sentence, such words will be so construed, if reasonably possible, as to render the whole clause or sentence intelligible and consistent. In re Testamentary Trust of Criss 379
14. One of the primary incidents of ownership of property in fee simple is the right to convey or encumber it. It is the general rule that a testator may not create a fee simple estate to vest at his death and at the same time restrict its alienation. However, this is not to say that such testator may not, in some situations, create economic incentives in his will encouraging the retention of property, without violating the rule condemning restrictions on alienation. In re Testamentary Trust of Criss 379
15. As a general rule, when an attempted prior interest fails under a will because the person to whom it is limited renounces it, succeeding interests are accelerated, with certain minor exceptions. In re Testamentary Trust of Criss 379
16. A testator is presumed to know that his widow might elect to take her share of his estate as provided for by statute and renounce any interest under his will. In re Testamentary Trust of Criss 379
17. When a widow elects to take her "forced" or statutory share and renounce her interest under her husband's will, she may well be treated as having predeceased her husband, thereby taking no interest under the will. In re Testamentary Trust of Criss 379

Witnesses.

1. An owner of real property shown to be familiar with the value of such land is a competent witness to testify as to its value for the use to which it is then being put, without additional foundation. However, in order to estimate its value for other purposes, the owner must, as any other witness, be shown to have an acquaintance

with the property and be informed as to the state of the market. Langfeld v. Department of Roads 15
2. The value of an opinion of an expert witness, or any witness, must be dependent upon and is no stronger than the facts upon which it is predicated, and it has no probative force unless the assumptions upon which it was based are shown to be true. Langfeld v. Department of Roads 15
3. The relative weight of conflicting evidence is necessarily determined by the credibility of the witnesses, which question is one solely for the jury which saw the witnesses and heard the testimony. State v. Brown ... 68
4. The jurors are the judges of the credibility of the witnesses and the weight to be given to the testimony, and they have the right to credit or reject the whole or any part of the testimony in the exercise of their judgment. State v. Brown 68
5. Witnesses generally are immune from civil liability for damages resulting from testimonial statements, and no civil action lies to recover damages caused by perjury or for conspiracy to commit perjury unless the perjury is but a part of a larger plan or scheme. Stolte v. Blackstone 113
6. A prison inmate has no absolute constitutional right to be released from prison so that he can be present at a hearing in a civil action. Caynor v. Caynor 143
7. A hypothetical question is not improper simply because it includes only a part of the facts testified to. State v. Miller 274
8. A parent as an informed and concerned lay person is competent to testify as to his or her opinion on "best educative interest." The parents were not testifying as experts, and the evidence was clearly admissible under Neb. Rev. Stat. § 27-701 (Reissue 1979). In re Freeholder Petition 532
In re Freeholder Petition 633
9. Uncontroverted testimony need not be accepted as absolute verity, especially when that testimony is opposed to common knowledge or human experience, or is inherently improbable, unreasonable, or unworthy of belief. In re Estate of McCartney 550
10. The trier of fact has a right to test the credibility of a witness by his self-interest and to weigh undisputed testimony against facts and circumstances in evidence from which a conclusion can be drawn that the testimony is not true. In re Estate of McCartney 550
11. The general rule is that a defendant's testimony at a former trial is admissible in evidence against him in

later proceedings. A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives. State v. Hilpert 564

12. Where one of several defendants on trial together voluntarily becomes a witness, he is a witness for all purposes. If he knows facts injurious to a codefendant, they may be brought out either by his own counsel or by the State. State v. Hilpert 564
13. A witness will not be rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case; rather, the witness will be permitted to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, provided that there is sufficient evidence to satisfy the court that the evidence was known and related prior to hypnosis. State v. Patterson 686

Words and Phrases.

1. The term "private passenger automobile," as used in the "drive other vehicle" coverage section of an automobile liability insurance policy, is clear and unambiguous and does not include a pickup truck. Johnsen v. Harper 145
2. "Custodial interrogation," within the meaning of the *Miranda* rule, means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. State v. Parsons 349
3. A devise to "issue" or "issue of the body" will be construed as meaning lineal descendants, rather than children, in the absence of qualifying words showing a contrary intent. In re Testamentary Trust of Criss 379
4. The meaning of the words "salary," as used in Neb. Rev. Stat. § 15-1007.01 (Cum. Supp. 1982), and "regular pay," as employed in § 15-1001 (Cum. Supp. 1982), are the same and include only basic pay without consideration of extra compensation for overtime, college credits, holiday service, etc. Hill v. City of Lincoln ... 517
5. "Reduction in force," within the meaning of Neb. Rev. Stat. § 79-1254.07 (Reissue 1981), has a clear meaning in common usage and means terminating a teacher "due to a surplus of staff." Roth v. School Dist. of Scottsbluff 545
6. The "estimated cost" of a building is its reasonable cost, erected in accordance with plans and specifications, and is not necessarily the amount agreed upon by the parties nor an offer to be accepted; it does not im-

ply absolute calculation, but precludes accuracy. Ruzicka v. Petersen 642
7. Under the provisions of the Indian Child Welfare Act, 25 U.S.C.A. §§ 1901 et seq. (1983), "preadoptive placement" means the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement. In re Interest of Bird Head 741
8. The meaning of the word "know," when used in a penal statute, varies with the context in which it is used. Hancock v. State ex rel. Real Estate Comm. 807
9. While the term "misconduct" is not specifically defined in Neb. Rev. Stat. § 48-628(b) (Reissue 1978), it has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations. Stuart v. Omaha Porkers 838

Workmen's Compensation.

1. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. The decision of the compensation court after rehearing must be considered in the light most favorable to the successful party, and every controverted fact must be decided in its favor. Noah v. Creighton Omaha Health Care Corp. 169
Caradori v. Frontier Airlines 513
2. The statutory scheme found in Neb. Rev. Stat. § 48-121 (Reissue 1978) compensates impairments of the body as a whole in terms of employability and loss of earning capacity but compensates impairments of scheduled members on the basis of loss of physical function. Nordby v. Gould, Inc. 372
3. The test for determining whether a disability is to a scheduled member of the body as a whole is not the situs of the injury but, rather, the location of the residual impairment. Nordby v. Gould, Inc. 372
4. The plaintiff bears the burden of establishing a causal relationship between the accident and any disability. Nordby v. Gould, Inc. 372
Caradori v. Frontier Airlines 513
5. Where the claimed injuries are of such a character as

to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. Caradori v. Frontier Airlines 513

6. An award of compensation may not be based on possibilities or speculative evidence. Caradori v. Frontier Airlines 513

Zoning.

1. A comprehensive development plan is merely a policy statement that may be implemented by a zoning resolution. It is the zoning resolution which has the force of law. If there is a conflict between a comprehensive plan and a zoning ordinance, the zoning ordinance contains the controlling provisions when questions of a citizen's property rights are at issue. Omaha Fish & Wildlife v. Community Refuse 234
2. The operation of a commercial sanitary landfill is not a recognized incidental use to a farming operation so as to be considered an accessory use under zoning ordinances. Omaha Fish & Wildlife v. Community Refuse 234
3. In order for an expenditure to have been made in good faith reliance upon improper zoning of a property, it must appear that the expenditures were made before any question as to the validity of the zoning was raised. Omaha Fish & Wildlife v. Community Refuse 234